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Legal Recognition of Citizen

Journalism on the Internet:

Development of Rights and Responsibilities

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SUMMARY

The subject matter of this thesis is the individual – the citizen journalist – who utilises the Internet and its various social media platforms tools in providing information, news and matters of public interest within a socio-political context and engaging with other individuals through commentary, opinion and debate. The central theme of the thesis is the exploration of the interaction between the citizen journalist on the Internet, the media and the law. The thesis premises on the belief that citizen journalism on the Internet needs a legal environment which encourages the protection of the right type of speech that fuels socio-political discussion and debate in matters of public interest. Only then can the positive contribution of citizen journalism on the Internet thrive and the individual's contribution to meaningful discourse can be sustained. Underlying this is the sentiment that the credibility of citizen journalism on the Internet as a positive element in society rests upon its legal recognition. The original contribution of the thesis to knowledge is the exploration of firstly, the extension of the traditional media rights and responsibilities to citizen journalists on the Internet when contributing to socio-political discussion which is in the public interest; and secondly, setting out the development of new legal norms in relation to citizen journalists on the Internet, different from those related to the traditional mainstream media and professional journalists and unique to citizen journalism on the Internet. The legal consideration of rights and responsibilities of citizen journalists on the Internet pivots on the backdrop of the historical contribution of citizen journalism as well as the rise of the phenomenon and the theoretical underpinnings that support citizen journalism on the Internet as an effective tool of speech and expression. The thesis advances the application of constitutional jurisprudence of the freedom of speech and expression to social media activity, the extension of rights and responsibilities of traditional mainstream media to citizen journalists on the Internet, the proposition of novel legal treatment of Internet-enabled citizen journalism and advances new principles in relation thereto.

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**'Man knows no master save creating Heaven,
Or those whom choice and common good ordain.'**

***Liberty*, James Thomson**

**[On the title page of Thomas Paine's pamphlet,
Common Sense, 1776]**

Chapter 1

Introduction

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1. Introduction - The Media and the Individual

1.1 The Media and the Individual – the essence of the research

The word “media” has a number of connotations. It can mean, *inter alia*, a form of communication of news and information; or a medium or mediums through which this communication can take place; or a group of entities in the business of communicating through one or more mediums. For the individual, the media is often the place where s/he receives news – the daily newspaper, the television, the radio or the Internet. The receipt of this news impacts upon the social, cultural, political and economic aspects of our daily lives – past, present and future. This impact on the individual has had consequences at each stage of the evolution of media, affirming the importance of media. With the introduction of the printing press, the individual was able to have access to material never before accessible to the individual such as the Bible. For the first time, information and its reproduction and distribution was no longer controlled by the chosen few. With pamphlets, the individual was able to write and distribute information on any subject matter to fellow citizens, whether popular or otherwise. Newspapers, in particular the penny press, allowed individuals to receive information of daily goings-on. With radio and television, the outreach of news and information to individuals went beyond the paper medium and the literate reader. With the Internet, the individual became the recipient and, in the subsequent evolution of the Internet, the producer of news.

The interaction between the individual and the media has evolved in tandem with the evolution of the media and its medium as well as its role. Where print’s initial role was to provide information to the passive individual, the same media allowed individuals to generate information through the printing of pamphlets. In a similar way, the initial role of the Internet was to disseminate information to the individual who had access to it and has evolved into a medium with tools that allowed the individual to share and generate his or her own information. In the case of both mediums – print and the Internet – the individual,

who was the passive recipient of information, evolved into the generator of news and information – the citizen journalist. In the case of the latter medium, work is publishable without significant barriers such as cost and resources. This evolution came alongside the development of the mainstream media which saw the emergence of powerful media entities such as newspaper owners, television and broadcasting corporations and news corporations. The individual pamphleteer of the past centuries or the individual using social media tools on the Internet in this century came to be known as the “alternative” provider of information, news and matters of interest within a socio-political context. The central protagonist of this thesis is *that* individual – the citizen journalist of our time – who in the changing landscape of the medium is using the Internet and the various tools it provides to allow the individual citizen journalist to engage with other individuals through commentary, opinion and debate. the central theme of the thesis is the exploration of the interaction between this individual citizen journalist on the Internet, with the media and the law.

1.2 Exploring the Interaction of Citizen Journalists on the Internet, the Media and the Law

In Malaysia, the law and the media have had a long relationship centred on the rights and responsibilities that the law attaches to the media. The rights, in the case of Malaysia, are fundamentally entrenched in the freedom of speech and expression and the responsibilities stem from the boundaries drawn by the legislature and courts to the extent of these freedoms.

The media that the law is familiar with is the traditional mainstream media upon which the constitution, statutes and case law have prescribed several hard won rights as well as responsibilities in the context of the important role played by the media in being a “watchdog” of the citizenry against the state and keeping the citizenry informed of matters of public interest. The media in this context is recognisable as the professional journalist who works for a newspaper, the news website or the news organisation. This recognition requires a rethink as the role of the media is being carried out by actors who are not part of the traditional and recognisable institution that is the media. Citizens are increasingly using Internet tools in contributing to news, based on their own news values and practices, providing different perspectives and introducing new issues for national attention and conversation. Matters of socio-political nature in the public interest are increasingly shared,

discussed and debated on citizen-moderated platforms, either complementing the mainstream media as an alternative source, or filling the vacuum left open by mainstream media on issues that citizens wish to be informed on or interact about. The phenomenon of citizen journalism has been felt at both the national and global level. In the case of Malaysia, citizen journalism on the Internet acts as a fundamental provider of alternative news and perspectives acting as a valuable instrument for democratic discourse and action. In view of the role that the phenomenon plays, the rights as well as responsibilities of citizen journalists on the Internet require legal recognition if it is to continue playing a credible role in acting as another conduit similar to that of mainstream media in the way in which the latter functions.

2. The Phenomenon of Citizen Journalism on the Internet

2.1 The Internet – Provider of Speech Platforms

The Internet and the *World Wide Web* means different things to different people and considering the varied uses of the Internet, there is no doubt that perhaps, for the last 15 years or so, it has changed the way we conduct our lives, interact and behave. The impact on society has been manifold. One of its contributory characteristics is its ability to allow communication with ease. This has naturally led to the evolution of the Internet into a platform for speech which has attracted its supporters as contributing positively to societal progress and equally its critics arising from the availability of this platform for the negative elements that arise from the ability to freely speak. As a platform for speech and expression, the ability for individuals to speak and have their voice heard, whether an opinion, a comment, to disclose wrongdoings, or simply make a contribution to a community, national or international conversation, has seen its significant impact in the recent times – emerging online cyberdissidency in China, political bloggers in countries where freedom of speech is suppressed and the raging Arab Springtime revolution. Conversely, these same platforms have been used in promoting harmful speech,¹ organizing illegal activities and assemblies, making nefarious statements, denigrating reputation of individuals and demonstrating both a lack of accountability and credibility.

¹ These may vary from state to state. In the context of Malaysia, harmful speech includes seditious speech which may incite racial and religious disharmony (Discussed in Chapter 5). Harmful speech now includes new types of harmful speech such as “trolling” (Discussed in Chapter 4).

Some of this speech on social media platforms has seen the emergence of the citizen journalist on the Internet. The citizen journalist has the potential to contribute to socio-political discussion which carries a public interest value in a manner similar to that of the role played by the traditional media in acting as the Fourth Estate where the position of the media or more precisely the press is of having 'a duty to speak the truth, whatever the consequences; and having the primary obligations to the public and to its readers.'²

2.2 Social Media Platforms – The Tools of Citizen Journalists on the Internet

The Internet is at a stage of development known as Web 2.0 which allows information to be delivered in a tailored form based on the needs of each user as well as allowing interactivity between users – a two-way process unlike Web 1.0 which only allowed individual users to publish information but not interact with each other. This media is empowered by a read/write web run by social networks and independent publishing platforms such as blogs, podcasts and video-sharing. The new media effectively works for the individual as s/he can select, prioritize and customize the kind of information s/he wants to receive from mass media and blogs through various tools and in the process even cuts down consumption. For instance, Internet-based news services can often be individually tailored to tastes and interests. Mass audiences are seen as a relic of the modernist age, while fragmentation of audiences and media sources is characteristic of the new postmodern era. These tools are presently empowering both the amateur and the professional.

The practical and growth factor popularizing citizen journalism is the availability and accessibility to the technology comprising of user-friendly and low-cost content-management tools available online.³ Blogs and videos have attracted the most attention but the recent trend is in getting news across as it happens in bite-sizes with the use of microblogs such as *Twitter*.⁴ This has attracted much attention and controversy (discussed in the course of consecutive chapters).

² Denis McQuail, *Media Accountability and Freedom of Publication* (OUP 2003).

³ Neil Thurman, 'Forums for citizen journalism? Adoption of user generated content initiative by online news media' (2008) 10(1) *New Media and Society* 139, 140.

⁴ See <www.twitter.com> accessed 14 January 2012. It is a short messaging service platform where the short messages known as "tweets" which cannot exceed 140 characters. A person who has a twitter account can follow other users' tweets and be followed.

The most popular of these platforms are blogs. Some have acquired mainstream media-like status such as *Huffington Post* - acquired by AOL in March 2011. The power of tools utilised by citizen journalists on the Internet is seen when a video or image turns viral⁵ as part of a message to the world giving *YouTube* its iconic status as a meaningful medium for democratic action and citizen empowerment. The ever-increasing reliance on social networking sites as part of daily activity naturally saw the use of such sites, primarily *Facebook* and *Twitter*, increase in popularity as tools of citizen journalism with *Facebook* pages and *Twitter* accounts dedicated to social causes and socio-political commentary attracting huge numbers of followers. The ability to share and embed information with these tools has led to the shift from UGC to UEC⁶ where a story or commentary on these sites can be shared with others. There are also dedicated websites such as *NowPublic* that allows users to share news and stories that have possibly missed the attention of the traditional mainstream media coverage with other users.⁷ New platforms have also developed as social media actors such as *WikiLeaks* which presents itself as a journalistic tool for individuals who may not want their identity disclosed but who wish to publish information on its site.⁸

2.3 The Appeal of Social Media Activity

From the 12 year old, to the champion of civil society, from the housewife to the purveyors of presidential candidates, blogging has become a cultural activity. It is the outlet for the need to speak out to the world, to anyone who may “listen”.

The ability of the Internet to bring attention to the voice of a single individual has enormous democratic appeal. The natural ability for that voice to be supported by anyone sharing the same opinion allows the Internet to appear as the next venue for an “assembly” of like-minded people. In reference to democracy in the wired world, Riley referred to the “new democracy” in 2000 – a view point which is increased in relevance in the context of social media activity:

⁵ A slang word used to describe a video or image that becomes popular over a short span of time particularly as a result of viewers’ sharing of the link to the said video or image, often attracting large amounts of hits or views.

⁶ “UEC” is an acronym for “user-empowered content”, discussed in Chapter 4.

⁷ These platforms will be discussed in greater detail in Chapter 4.

⁸ The discussion of *WikiLeaks*’ validity and recognition as a journalistic tool is beyond the scope of this thesis.

The new democracy we see surfacing is more the expression of individual voices that congeal into a collective whole over ideas that the society of peoples on-line develop into a consensus. And while a consensus might be formed on major issues, individual people are still in a position to express their individual thoughts and ideas (even if they range from the erudite to the opinionated).⁹

A "bottom up" model of democracy emerges as anyone with access to a computer connected to the Internet can express and share their views. Accessibility to the tools that facilitate such journalism on the Internet is one of the reasons for its rapid popularity, such as a blog or to visual presence on *YouTube* or *MySpace*. As Papandrea comments:

One main reason blogs have proliferated is the absence of barriers to entry: a website can be created in minutes at little or no cost. Blogs cover every sort of imaginable issue. Although many of these millions of blogs are simply online diaries, political blogs are some of the most popular and well-known contributors to the public debate. Some blogs provide readers with original research; others consist primarily of categorized and digested links to other news sources. One of the benefits of some blogs is that readers are able to hear directly from experts who would ordinarily be quoted by mainstream media. In addition, the creativity, knowledge, and expertise of bloggers often dwarf that of journalists in traditional media outlets.¹⁰

Citizen journalism fills the vacuum created by the traditional mainstream media and acts as an alternative news source. The news, opinion or commentary by citizen journalists on social media platforms appeals to a readership who finds it informative and important (discussed in Chapter 4). The vacuum results from a selective criterion of coverage of news material by traditional mainstream media. The mechanism of selection is known as gatekeeping which is rooted in the decision making powers of an individual editor or a group of individuals comprising of the editor, sub-editor and/or writer in line with the interpretive element of professional journalism where the professional journalist determines on behalf

⁹ Thomas B Riley, *Electronic Governance and Electronic Democracy: Living and Working in the Wired World* (The Commonwealth Secretariat 2000) 108.

¹⁰ Mary-Rose Papandrea, 'Citizen Journalism and the Reporter's Privilege' (2006-2007) 91 Minn L Rev 515, 523.

of the public what the public sees, hears and reads about the world.¹¹ The process leaves the reader disengaged and disinterested in news stories or restricts the information available to the reader. The consequences of gatekeeping and agenda-setting by mainstream media results in 'the deficits in mainstream media'.¹² These deficits are a consequence of, *inter alia*, state regulation,¹³ or the dumbing down of news – where the social and political role played by journalism is not carried out in a manner consistent with the duty and obligation of informing the masses with matters of public interest.¹⁴ The duty of 'informing' is tied in with the right for the public to be 'informed'.¹⁵ The justification in supporting citizen journalism through new media lies in its capacity for enriching democratic debate and action,¹⁶ free from national stereotyping and that it allows the higher ideals of freedoms to be meaningful at the individual level, transcending social barriers, inhibitions and impediments, whether geographical, legal, social or even psychological. The degree and extent of the deficit and reliance on citizen journalism generated through new media may differ from country to country owing to a variety of reasons (explored in Chapters 3 and 4).

The greatest appeal of political blogging in the use of new media and technology 'lies in the opportunities they offer for re-establishing direct relationships between citizens and political exponents, as well as giving life to new forms of participation in democratic processes. It has seemed as if, in one fell swoop, the cure has been identified for suffering democracies, to the point of attributing to ICTs the power to save them.'¹⁷

The phenomenon has also raised several questions on the credibility and value of citizen journalism. Citizen journalists could be accused of lacking professional standards and

¹¹ Mark Deuze, 'What Is Journalism? Professional identity and ideology of journalists reconsidered' (1995) 6(4) *Journalism* 442, 451.

¹² Description by Briggs and Burke and quoted in Jay Blumler and Michael Gurevitch, *The Crisis of Public Communication* (Routledge 1995). Discussed further in Chapters 3 and 4.

¹³ This was seen particularly in the Arab Springtime Revolution where media in North African and Middle-east states was regulated by repressive, anti-democratic nature of the regimes whereby the revolution relied on new social media tools such as *YouTube*, *Facebook* and *Twitter* to firstly coordinate and then communicate to the world the news from within the state involved in the uprising bypassing the state controlled media; see Simon Cottle, 'Media and the Arab uprisings of 2011: Research notes' (2011) 12 *Journalism* 647, 648-50.

¹⁴ Anthony Sampson, 'The crisis at the heart of our media' (1996) 17(3) *British Journalism Review* 47.

¹⁵ *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290-91 (Lord Bingham).

¹⁶ Democratic action here could result in change in the general elections outcome in a country, eg. Malaysia or democratic change in the removal of repressive regimes eg. In Libya and Egypt as a result of Arab Springtime Revolution. Discussed in Chapter 4.

¹⁷ Sara Bentivegna, 'Rethinking Politics in the World of ICTs' (2006) 21 *European Journal of Communication* 331, 338.

objectivity and may not be equipped to filter the speech that is seen to serve public interest and having the value to contribute to socio-political discussion. Most individuals who write on social media platforms may not be conscious, unlike professional journalists, that their writing is making such a contribution and several may not have the intention to make a contribution. The differences between citizen and professional journalism are a theme that will be explored throughout this thesis as the essence of the differences will influence the legal treatment of citizen journalists.

How does the law then view the citizen journalist on the Internet who is contributing to a socio-political discussion that has a public interest element? Does the law view the citizen journalist in this context as performing a role that is analogous to that of a journalist working for a news organisation?

The exploration of the research question will be undertaken in seven chapters. This introductory chapter, Chapter 1, will set out, in the following pages, the research question, the motivation for the research, contribution of research, the main themes emerging from the literature review that will pervade through the thesis and the research methodology.

3. Hypothesis

3.1 The Research Question, the Motivation for Research and the Contribution of the Research

This research is undertaken to the central research question – what is the extent of legal recognition of citizen journalism on the Internet and how should the rights and responsibilities of citizen journalists on the Internet be developed.

The thesis is an investigation of the legal challenges that citizen journalism on the Internet raises particularly in obtaining recognition as tool of freedom of speech akin to the role played by the media as the distributor news, opinion, commentary and information essential in a democratic state. In view of the increased importance of such speech, the need of the study will address firstly, the extension of established legal principles that accord rights and responsibilities related to the media to the citizen journalists on the Internet when contributing to socio-political discussion which is in the public interest, and

secondly, the development of legal perspectives to deal with the unique character of citizen journalism on the Internet. The thesis underlies the premise that the credibility of citizen journalism on the Internet as a positive element in society rests upon its legal recognition.

Citizen journalism is a type of journalism in which ordinary citizens, who are neither independent professional journalists nor employed by mainstream media, adopt the role of a journalist in order to participate in newsmaking normally as a first-person eyewitness during times of crisis by utilizing various tools such as audio or video recordings, using mobile technology such as mobile and smart phones which are then shared online through social media platforms.¹⁸ "Citizen journalism" in the context of the research question focuses on socio-political discussion on the Internet generated by users. "Socio-political" in this context goes beyond its plain meaning of involving a combination of social and political factors but it means how these are factors affecting society which are issues the society views as essential, both nationally and internationally, and requiring democratic involvement of citizens in their discussion and determination. "New media" refers to the various social media platforms and forums found on the Internet that carry this discussion and is commonly referred to as "social media". These platforms are seen as a new medium of communication for news and information.

This new media hosts and disseminates information generated by citizen journalists that augments its role as a journalistic tool. These include *inter alia* blogs,¹⁹ social networking sites (hereinafter referred to as 'SNS')²⁰ and microblogs²¹ that are made possible by Web

¹⁸ Adapted from Barbie Zelizer and Stuart Allan, *Keywords in News & Journalism Studies* (McGraw Hill 2010) 18-19, and Sue Robinson and Cathy DeShano 'Anyone can know': Citizen journalism and the interpretive community of the mainstream press' [2011] 12 *Journalism* 963, 965. The phrase was first coined during the South Asian Tsunami of December 2004 where the aftermath of the disaster was channeled mostly through individual accounts and imagery.

¹⁹ 'Blog' is short for 'Web log'. Definitions of 'blog' on the Web commonly refer to it as an online journal or web journal which allows an individual or groups of individuals to share a running log of events and personal insights. Blogs often allow visitors to make comments or postings in response to the opinions made by the blogger or even post questions. The word 'blog' is defined as 'an online diary; a personal chronological log of thoughts published on a Web page'; Webster's New Millennium Dictionary of English, Preview Edition (v 0.9.6) <<http://dictionary.reference.com/browse/blog>> accessed 23 January 2012. The term 'blogger' refers to the author of a blog. Defining what counts as a "blog" is not an easy task. Some say that a blog has three main features: the postings appear in reverse chronological order, the content is unfiltered, and it permits comments from readers. See, Michael Conniff, 'Just What Is a Blog, Anyway?' (*Online Journalism Review*, 29 September 2006) <<http://www.ojr.org/ojr/stories/050929/print.htm>> accessed 23 January 2012.

²⁰ Examples of social networking sites include *Facebook*, *Tumblr*, *Twitter*, *Flickr*, *Bebo*, just to name a few.

²¹ Microblogs such as *Twitter*, *Tumblr* and *Plurk* are limited to the exchanges of short messages.

2.0²² technology which allows user-generated content (hereinafter referred to as 'UGC') to be published.

Content on these platforms range from the important to the frivolous. Take for instance content on blogs. This ranges from blogs that are personal diaries to blogs that are forums on a particular area of interest and then there are socio-political blogs written and published by political dissidents, opposition leaders or a citizen in conversation with other citizens on matters of national importance affecting the daily life of the citizenry or community. The same can be said of *Facebook* pages dedicated to a variety of events and causes from the purely social to rallying support for causes. The research emphasis is not on all content but on content that meaningfully contributes to socio-political discourse which is in the public interest.

The interest in the research stems from two factors. The first is the emergence and revival of the citizen journalist from the time of the lonely pamphleteer seen between the 16th and 17th centuries in England and in the US. The popularity of citizen journalism through activities such as blogging facilitated by the Internet in relaying "alternative" news, opinions and commentary is a contemporary phenomenon. The emergence of socio-political media on the Internet not only introduces a new kind of journalism but is also seen to bring pluralism to media. This is especially the case when the traditional and mainstream media is strictly regulated by law and there is inadequate protection of free speech and expression, as is the position in Malaysia, or when readers are sceptical about mainstream media gatekeeping influenced by internal or external factors. The phenomenon of Internet-enabled citizen journalism has been described as the Fifth Estate where discourse is open,

²² Web 2.0 is an expression which was used for the first time in 2004, a phrase coined by O'Reilly Media and referred to the second generation of Internet. See Tim O'Reilly, 'What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software' (*O'Reilly*, 30 September 2005) <<http://oreilly.com/web2/archive/what-is-web-20.html>> accessed 20 January 2012. The main characteristics of new era in Internet is connected with its constant development and delivering services tailored to the needs of each user that emphasize online collaboration and sharing among users. Some of these applications include wikis, blogs and Flickr. Since 2006, there have been several visionaries who are attempting to define Web 3.0 representing the third decade of the web from 2010 to 2020 which is presently in its evolutionary stage. The phrase was coined by John Markoff of the New York Times in 2006. To Tim Berners-Lee, Web 3.0 is perceived as the Semantic Web "which is a place where machines can read Web pages much as we humans read them, a place where search engines and software agents can better troll the Net and find what we're looking for"; Cade Metz, 'Web 3.0' (PCMag.com, 14 March 2007) <<http://www.pcmag.com/article2/0,2817,2102852,00.asp>> accessed 29 January 2012.

interactive, citizen-to-citizen and democratic.²³ This new breed of citizen journalists fuels debate within both national and international conversations. The technology that facilitates it provides innumerable platforms such as blogs and SNSs that allow users the ease with which to do this.

The second factor was the way in which citizen journalism was propelled to the forefront in Malaysia through political blogs acting as alternative media for both independent voices and that of the opposition. The blogosphere also acted as a place to assemble with like-minded citizens and organize rallies such as the BERSIH rally held on 10 November 2007 for free and fair elections. In relation to the outcome of the general elections held on 8 March 2008, political analysts have commented that the denial of a two-third majority to the ruling party in Parliament, for the first time in the history of Malaysia since independence by the electorate, was a consequence of the influence of “alternative-media” in the form of these blogs (detailed discussion in Chapter 3).

The motivation for the research is that in order for the positive contribution of citizen journalism on the Internet through social media activity is to thrive, there is a need for a legal environment that will encourage the volume of the right type of speech in the exercise of the freedom of speech and expression that contribute to socio-political discourse and the protection of such speech. This legal environment is essential in providing legal recognition to citizen journalists on the Internet in terms of the rights that could be accorded to them and the responsibilities attached to the said rights. The research will show that essentially the scope of rights and responsibilities stem from media rights as well as several rights that are independent of media rights but are unique to citizen journalism on the Internet. The research will also show that when dealing with a legal system where the media has established rights, the exercise of according citizen journalists with some form of recognition is capable of being built on established media rights. In the case of Malaysia, the research will show the potential of the current legal framework in according these rights to citizen journalists and also the need to develop the framework further - a case of filling the unfilled legal basin. A bottom-up approach needs to be taken in view of the insufficient

²³ Reference to social media as the “Fifth Estate” made in reference to the role played by social media in democratic discourse in Asian states. See *Open Net Initiative* <www.opennet.net/research/regions/asia> accessed 30 January 2012.

development of jurisprudence related to media rights built on and derived from constitutional provisions namely freedom of speech and expression.

The thesis research will be of interest to regulators on vital considerations in legislative action or non-action. More specifically, it is hoped that the research will act as a source of direction, raising questions, providing considerations to take cognizance of several of the issues. It will certainly contribute to the development of legal norms, in particular in assisting interested parties in answering questions as to whether a particular legal response can be effective and how it can most effectively be developed. More importantly, in the context of Malaysia, it will provide the starting point for a discussion on how to fill the unfilled legal basin of media rights as a whole and building on from there, the rights of citizen journalists. The thesis will advance a concrete consideration and expansion of the constitutional jurisprudence of the freedom of speech and expression resulting from social media activity, the possibilities as well as the challenges of extending media rights to citizen journalists on the Internet, the consideration of novel legal treatment of Internet-enabled citizen journalism and advancing new principles in relation thereto.

3.2 The Principal Aim

The main aim is to explore the new conundrums arising from citizen journalism on the Internet and the legal responses to these in order to develop several legal norms related thereto. These conundrums include, *inter alia*, whether citizen journalists on the Internet be viewed as journalists when they contribute to socio-political discourse; whether the rights and responsibilities developed for the traditional mainstream media and professional journalists be extended to citizen journalists on the Internet on social media platforms; is there a need to devise new legal norms in relation to citizen journalism on the Internet different from those applied to professional journalists in particular in terms of anonymity of the citizen journalist or when the citizen journalist is both the distributor of information and the confidential source; and whether a citizen journalist on the Internet would benefit from being labelled as "journalist" or will this label impede social media activity.

The precursor to this will entail the examination of the importance and evolution of media and citizen journalism, and the exploration of the challenges posed by this media. This will

lead to the corollary issue of discussing the type of legal responses the courts or legislature could adopt. The auxiliary questions to the main research question are set out below:

What is the role and function of mass media and journalism in society? The inquiry into the characteristics and nature of the social and political role of the media and journalism is important in order to answer the overarching question if there is a place for citizen journalism.

What is citizen journalism and new media, and its importance to society? Following from the first question, it is essential to place in context the “messenger”, the “message” and the “medium of the message” – which translates into: the citizen journalist; the discourse, news and critique; and the tool on the Internet that facilitates the information being put forward. Further, it will include how citizen journalism has impacted social and political discourse and become part of national conversation.

What has been the response to citizen journalism on the Internet and the threat posed by such journalism to the state, mainstream media and the citizenry? An evaluation of how different governments perceive such form of journalism and how the state has worked the legal machinery against citizen journalists will be undertaken. Case studies will be discussed on the extent of success achieved by these initiatives in curtailing speech generated by citizen journalists on the Internet have been in Malaysia, the UK and the US.²⁴

Can the current legal rights enjoyed by the media be extended to citizen journalism on the Internet? An examination of the rights and privileges extended to the media will lead to an assessment of whether these can be extended or adapted to extend to citizen journalism on the Internet. The starting point of this review will be the constitutional right to free speech and expression in the US, UK and Malaysia, and then extending it to several areas of media law that branch out from this right such as protection of reporter’s privilege, the “open justice” principle and “prior restraint”.

²⁴ See Heading 5.2 on explanation on the choice of these legal systems in analyzing the research question.

What is the suitable legal response to be undertaken? Legal responses will be drawn from the present laws and from the adoption of a new approach to this type of journalism. These will be measured against several theoretical frameworks.

4. Literature Review and the Emerging Themes: Identification of Competing Interests

There is a large and varied amount of legal literature on discussions of the Internet as a conduit for free speech and issues arising from the Internet as a public forum involving conflict of laws and hate speech. In relation to a study of how blogs and similar web-enabled platforms should be treated by the law and the courts, there is a gap in the literature. There is limited writing on the extension of the reporter's privilege to citizen journalists and the discussion on importance of anonymity to web users in order for speech to flourish in the US context. This discussion has made some crossover although not directly as a result of disclosure of web users' identity in the UK, namely the *NightJack's* case²⁵ in the High Court and the controversies surrounding *Twitter* (discussed in Chapters 4 and 6). Several studies²⁶ on participatory journalism based on reports from editors of news sites that allow participatory journalism have provided some thought on how professional journalism perceives citizen journalism. Most, if not all, of these studies are undertaken from the viewpoint of journalistic studies. Although helpful in understanding the phenomena of citizen journalism on the Internet from the point of UGC, its role in news making and discourse, little has been said of legal implications of blogs and similar Internet-enabled platforms. There is nevertheless a heightened interest in social media activism in 2010 and 2011 as a result of the phenomenal impact of *WikiLeaks* and use of SNSs in the Arab springtime revolutions in 2011.

A range of competing interests have emerged from the literature, the considerations of which will be the core of the thesis. These are set out in the sub-headings *infra* and will appear in substantive discussions in the forthcoming chapters.

²⁵ *The Author of a Blog v Times Newspaper Limited* [2009] EWHC 1358 (QB).

²⁶ D Domingo, T Quandt, A Heinonen, S Paulussen, J B Singer, M Vujnovic, 'Participatory Journalism Practices in the Media and Beyond: An international comparative study of initiatives in online newspapers' (2008) 2(3) *Journalism Practice* 326; (n 3).

4.1 Citizen Journalism v Professional Journalism

One of the most important aspects of the research is to make case that citizen journalism plays a role that is analogous to the role played by professional journalism and traditional mainstream media.

Journalism plays a vital role in society and the role in contemporary society extends beyond merely publishing information and news. McNair states that the role of journalism in society is said to be 'one of the key social and cultural forces in our society'²⁷ in influencing opinion and acting as a source of information about the world. McNair describes journalism as being akin to 'an ongoing narrative about the world beyond our immediate experience' and which, he adds, is asserted to be 'true' in that 'the stories told by journalists are factual rather than fictional.'²⁸ He draws the conclusion that journalism performs a 'unique and essential social function.'²⁹ He further extends the role of journalism beyond the basic social function by emphasizing that 'journalism is said to perform a political role in liberal pluralist societies, feeding and sustaining the democratic process by supplying citizens with the information which they require to make rational electoral and economic choices.'³⁰ This 'underpins democratic institutions by keeping voters informed about the things they need to know.'³¹ The task of journalism is 'to make information publicly available',³² this being 'one basic ingredient of the public sphere...required for public participation in discussion and decisions'. Pondering on McNair's polemic, has journalism in certain societies failed in fulfilling its social and political role? And could it be suggested that citizen journalism could, to a certain degree, make good this failure?

One of the challenges posed in the process of recognising citizen journalists is one of definition. Citizen journalism is often referred to as non-professional journalism produced by individuals who are not linked to mainstream media entities. Professor Laurence Alexander defines 'journalist' to include 'any person who is engaged in gathering news for

²⁷ Brian McNair, *News and Journalism in the UK* (Routledge 1999) 19.

²⁸ *ibid* 21.

²⁹ *ibid*.

³⁰ *ibid*.

³¹ *ibid*.

³² Klaus Bruhn-Jensen, *Making Sense of the News* (Aarhus University Press 1986) 31; quoted by McNair, *supra* n 27, 21.

public presentation or dissemination by the news media.³³ 'News' is defined as 'information of public interest or concern relating to local, state-wide, national or worldwide issues or events,'³⁴ and 'news media' as 'newspapers, magazines, television, and radio stations, online news services, or any other regularly published news outlet used for the public dissemination of news.'³⁵ These definitions seem to clearly exclude citizen journalists. However, several definitions appear to be more inclusive where 'news' for instance has been simply defined as 'news information about an event or issue that is shared with others in a systematic and public way'.³⁶ However, citizen journalism may not always produce news in a 'systematic' way. Alternatively 'news media' is defined as 'those media that provide news coverage for the public'³⁷ which is general and wide enough to include news on social media platforms generated by citizen journalists.

The ever expanding literature on the equal legal treatment of citizen journalists as professional journalists identifies one of the key propositions of this thesis.³⁸ The challenge is two-fold. One, professional journalists still face legal challenges in enjoying protection in areas such as reporter's privilege,³⁹ and two, the recognition of citizen journalism on the Internet as being analogous to that of a professional journalist.

In terms of extending reporter's privilege to citizen journalists, one of the earliest propositions of this was made by Papandrea.⁴⁰ Papandrea comments that one of the challenges in doing so would be to develop the definition of who is a journalist to a wider category to include citizen journalists. Papandrea acknowledges that whilst there will be difficulties in identifying who should be entitled to the privilege in the context of new media, this however should not doom the privilege's very existence as the "struggle" in defining who is entitled is not a new challenge. His challenge has often been faced by both legislatures and courts alike. It is argued that the focus in this debate should rather be the

³³ Laurence B Alexander, 'Looking out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information' (2002) 20 Yale Law & Policy Review 97, 130.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ Barbie Zelizer and Stuart Allan, *Keywords in News & Journalism Studies* (McGraw Hill 2010) 80.

³⁷ *Collins English Dictionary* < <http://www.collinsdictionary.com/dictionary/english/news-media> > accessed 21 July 2012.

³⁸ (n 10).

³⁹ (n 33); Jeffrey S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (Nov 2005) 154 (1) University of Pennsylvania Law Review 201-256.

⁴⁰ *ibid.*

underlying purpose of the privilege which is to increase the flow of information in encouraging and protecting open communication including the identity of confidential sources of this information.

There is also the question of whether rights and privileges as well as responsibilities that extend to journalists in relaying public interest information should extend to citizen journalists such as the responsible journalism 10-indicia test, discussed under the Heading 4.4 *infra*.⁴¹ In the context of discussing and extrapolating rights, privileges and responsibilities of professional journalists and established media to citizen journalists and the new social media environment, it must be recognised that there are key characteristics that distinguish the two. The risk of such type of exercise would be to change the nature of discourse by citizen journalists and therefore, any conclusions on any legal treatment of speech by citizen journalists must exhibit an appreciation of the differences.⁴² Citizen journalists using web-enabled platforms are not professional journalists who have the training, skills and backing of an employer. They are not in employment and their motives are often to speak of a cause.

In the context of Malaysia, the recent debates surround the arrest of bloggers and the attempt at blocking websites hosting prominent political blogs, has taken the research question to the centre of national conversation. In countries where the mainstream media is regulated by the government's iron fist, citizen journalism on the Internet acts as the channel for alternative opinion and a source of real and accurate news.

Within this theme, the thesis will explore the credence given to citizen journalism when the news, opinion or commentary of citizen journalists on social media platforms are reported by mainstream media or used by professional journalists; the legal discussion of the extension of reporter's privilege of confidentiality of sources to citizen journalists on the Internet and the discussion of treating citizen journalists as "journalists" in contributing to socio-political discourse which is in the public interest.

⁴¹ *Reynolds v Times Newspaper* [1999] 4 All ER 609, [2001] 2 AC 127; *Jameel v Wall Street Journal Europe* [2006] UKHL 44, [2006] 4 All ER 1279, [2007] 1 AC 359, [2006] 3 WLR 642.

⁴² Discussed in Chapters 5 and 6.

4.2 Free Speech v Harmful Speech

Social media platforms or the Internet in general are viewed as tools of free speech. Whilst the utility of these platforms are essential in placing citizens' speech in the marketplace, there is also the need to appreciate that not all speech contributes to socio-political discourse such as harmful speech.

Barendt's seminal text on freedom of speech⁴³ in the UK has become expansive since its first publication in 1985. Barendt in his preface to the second edition admits the increased appreciation of comparative free speech law led by the House of Lords in *Reynolds*⁴⁴ where their Lordships made reference to cases from other jurisdictions and the European Court of Human Rights. In that spirit this thesis will do the same.

Barendt's discussion on the Internet in the context of how it has become the tool for free speech raises issues of how free speech principles could be debated in relation to a new medium including considerations such as the problems surrounding global communications.

Barendt sets out the fundamentals of free speech in the context of media⁴⁵ and the Internet,⁴⁶ making Barendt an important point of reference as the thesis substantively cradles both these areas. Further, Barendt sets out the basis upon which media rights are built, including the position in the US. In relation to how speech is to be treated on the Internet, Barendt reminds us that the US Supreme Court in *ACLU v Reno*⁴⁷ "did not explicitly bracket the Internet with the press and other print media for the purposes of the First Amendment."⁴⁸ He adds that "The Internet has not yet assumed the role which the press performs when it reports and investigates public affairs."⁴⁹

Barendt's statement that the Internet has yet to play the Fourth Estate role is dated. The Internet has been called the "Fifth Estate", a term used by *Open Net Initiative*, to refer to the space for networking individuals created on the Internet by digital technologies.⁵⁰ Whilst

⁴³ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005)

⁴⁴ (n 40).

⁴⁵ (n 43) 417-450.

⁴⁶ (n 43) 451-474.

⁴⁷ 521 U.S. 844 (1997).

⁴⁸ (n 43) 455.

⁴⁹ (n 43) 456.

⁵⁰ Open Net Initiative's Fifth Estate project, *Oxford Internet Institute*, <<http://www.oii.ox.ac.uk/research/projects/?id=57>> accessed 21 January 2012.

the purpose of both the Fourth Estate and the Fifth Estate is to promote checks and balances and proper governance of the state, the distinction lies in the entity acting as the “estate” – in the case of the former, the mainstream media, and in the latter, the individual using social media platforms.

The voice that rallies in the blogosphere and amongst political blogs may appear to governments as the voice of dissent or, conversely, it may positively facilitate people participation in influencing government policies. The fear of certain governments lies, *inter alia*, in three things. The first is how this medium reduces the time taken for a ‘developing story’ to germinate into an issue;⁵¹ secondly, the way people are empowered not merely to be informed but also to ‘talk back’ and dialogue;⁵² and thirdly, the interconnectivity between the different types of Internet-enabled media presents difficulties in controlling the dissemination of the information.⁵³ The danger of harmful speech produced through social media activity could also be a consequence of citizen journalists not being bound by codes of professional ethics but only based on an individual’s subjective assessment of the information to put out on the Internet.

Some of the most frequently occurring concerns with such media is the authenticity of the information, perhaps even its neutrality or objectivity, and its increasing popular outreach. This characteristic may have damaging effects arising from harmful or false speech. The Internet with its openness allows many-to-many conversations to take place and to a large extent a large amount of this speech is anonymous where users create pseudonyms under the cloak of which inhibitions to speak freely are removed. However, in the case of socio-political discourse that may be harmful, libellous, insidious or nefarious, this type of speech and its speaker must be made accountable. Therefore, one of the fundamental areas to explore is the need to achieve a balance between public order and liberties. The web has been seen to play the function of promoting freedom of speech and expression in a democratic society,⁵⁴ very similar to the role seen to be played by the mainstream media.

⁵¹ (n 9) 110.

⁵² *ibid.*

⁵³ Yaman Akdeniz, Clive Walker, and David Wall (eds), *The Internet, Law and Society*, (Longman, 2000) 129.

⁵⁴ (n 17) 338.

Tied in with this role is that of the role of playing 'public watchdog'⁵⁵ which has to be executed with integrity whilst at the same time the execution is heavily laced with factors such as responsibility, balancing freedom of expression with national security, public safety, prevention of disorder, privacy and other similarly toned qualifications.

Within this theme, the thesis will explore the contributions of citizen journalists on the Internet through the use of social media agents leading to a rethink of Barendt's inference from *Reno*; advancing the argument that individuals have the potential to perform and complement the role played by the press in liberal democratic societies or in societies where there are democratic aspirations; the extension of media rights within entrenched principles of freedom of speech and expression particularly the type of speech that is protected and that can flourish by upholding these freedoms; the boundaries of these freedoms when the law imposes responsibilities on media and consideration of encouraging free speech and expression by upholding anonymity of citizen journalists on the Internet.

4.3 Rights v Responsibility and Accountability of Speakers

With the according of privilege and rights, comes accountability. McQuail's insightful account of the issues of media accountability to society and the complexities that surround them provides a solid foundation to determine the degree of accountability which is owed in balancing it in relation to public interest and freedom of speech.⁵⁶ He speaks of an increasingly "networked society"⁵⁷ which has led to media corporations having a global outreach turning them into the cultural institutions of our time and 'the principal means of public expression in contemporary society.' At the outset in the opening pages of the book, attention is drawn to his exposition of the term "media". He states:

The term 'media' can variously identify an industrial sector, a set of technologies, a set of firms and organizations with power in society, or an institution often referred to as 'the press'. None of these meanings captures what is central to the theme of this book, although all are relevant. In order to get to the heart of the matter, our attention focuses on the *core activity of*

⁵⁵ Brian McNair, *Journalism and Democracy: An evaluation of the political public sphere* (Routledge 2000); *Observer and Guardian v UK* (1992) 14 EHRR 153 [59].

⁵⁶ (n 2).

⁵⁷ *ibid* 4.

the media [added emphasis] since the earliest days of printing, which is to publish, to mediate between authors and original sources and an eventual audience or public, facilitating or realizing the act of publication. The term 'the media' collectively identifies all organizations, roles, means, and activities that contribute to publication. The latter means to bring expression into the open and to disseminate it further. Media accountability relates both to the purposes and also the consequences of publication. It refers to all ways in which public communication is 'accounted for', by its originators, its recipients, and those affected by it.⁵⁸

McQuail was focused on "the core activity of the media" in identifying different players who were in the activity of publication and the duty of accountability as being attached to this. If citizen journalism on the Internet falls within this core activity, then citizen journalists will be held to be accountable to the standards that media as a whole is accountable as seen by McQuail.

The difficulty of addressing the conflict between protecting rights of speakers against the responsibility and accountability of speakers particularly in the context of speech on the Internet arises in the issue of anonymity of the speaker's identity.⁵⁹ Where it comes into conflict with genuine and compelling interests of third parties, disclosure may be warranted, the right to speak is not absolute.⁶⁰ Both in the US⁶¹ and the UK,⁶² the courts have allowed claimants who are seeking redress arising from harmful speech to apply to the courts for an order to disclose the identity of anonymous users of the Internet.

Whilst disclosure of identity may add credibility, anonymity may allow the author to avoid negative consequences of wrongful retaliation and it will encourage contribution to the

⁵⁸ (n 63) 4-5.

⁵⁹ George W Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (1989-1990) 7 PACE Environmental LR 3; Anne Wells Branscomb, 'Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces' (1994-1995) 104 Yale LJ 1639; Joshua R Furman 'Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation' (2001-2002) 25 Seattle U LR 213.; Lyrissa B Lidsky and Thomas F Cotter, 'Authorship, Audiences and Anonymous Speech' (2007) 82 Notre Dame LR, 1537; Comment, 'The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil' (1961) 70 Yale L J 1084.

⁶⁰ *McIntyre v. Ohio Elections Commission* 514 US 334 (1995) 353.

⁶¹ *John Doe v 2theMart.com Inc* 140 F Supp 2d 1088 (2001); *Dendrite International Inc v John Doe* 775 A 2d 756 (2001); *McConnell v FEC* 540 US 93 (2003); *O'Grady v. Superior Court* 139 Cal App 4th 1423 (Ct App 2006).

⁶² (n 25).

marketplace of ideas as it eliminates barriers to speaking and listening allowing the inclusion of voices in public debate that might not otherwise be heard.⁶³ The removal of barriers encourages citizens to voice against, and check abuses of, powerful organizations, corporations and governments. The fear in being named may be, or is very real to the individual where retaliation or harm will follow disclosure particularly in cases implicating whistleblowers or for political dissidents in authoritarian states who need to speak under a cloak of anonymity.⁶⁴ In *McIntyre v. Ohio Elections Commission*,⁶⁵ the US Supreme Court pointed out that the 'decision in favour of anonymity may be motivated by fear of economic or official retaliation.'

The US "marketplace of ideas" theory through the pronouncements of the justices of the Supreme Court is instructive in grasping the general importance of anonymity. Justice Oliver Wendell Holmes in his dissent in *Abrams v United States*,⁶⁶ argued that society's ultimate good is better reached by free trade in ideas and 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.' Anonymity encourages individuals to speak without fear of being exposed for having a minority view point or an unpopular stand. The US Supreme Court recognised the importance of anonymity in *NewYork Times Co v Sullivan*⁶⁷ and *McIntyre v. Ohio Elections Commission*⁶⁸ just to name a few judicial pronouncements as contributing to the marketplace of ideas.

In the US, Internet speakers have used anonymity to avoid being sued in SLAPP (an acronym for 'Strategic Lawsuits Against Public Participation') suits but where there is a prima facie case of liability arising from defamatory statements or disclosure of confidential information, the courts have issued disclosure subpoenas.⁶⁹ Claimants seek a discovery subpoena from the court, popularly known as *John Doe* proceedings, to order ISPs, website host or social networking sites to disclose the identity of anonymous users. Such a subpoena creates the risk of the loss of one's privacy as an anonymous speaker if the claimant fails in

⁶³ Lyrrisa B Lidsky and Thomas F Cotter, 'Authorship, Audiences and Anonymous Speech' (2007) 82 Notre Dame LR, 1537, 1570-1573.

⁶⁴ Anne Wells Branscomb, 'Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces' (1994-1995) 104 Yale LJ 1639, 1642.

⁶⁵ 514 US 334 (1995) 341.

⁶⁶ 250 US 616 (1919).

⁶⁷ 376 US 254 (1964) 270.

⁶⁸ 514 US 334 (1995) 341.

⁶⁹ Joshua R Furman, 'Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation' (2001-2002) 25 Seattle U LR 213.

the claim leading to potential abuse of the process arising from SLAPP suits. It bears on the courts to be prudent in issuing such disclosure subpoenas. Although there have been numerous standards used by the courts, the key to the unmasking and disclosure of anonymous speakers is to undertake a balancing exercise after the claimant successfully proves that attempts have been made to provide notice to the anonymous speaker and has evidenced a meritorious claim against the said speaker.⁷⁰ This is where the court weighs the defendant's First Amendment right to speak anonymously against the claimant's case for disclosure.⁷¹

In the UK, the disclosure procedure involves a *Norwich Pharmacal* application, named after the decision of the House of Lords⁷² where the conditions for such application were laid out. In essence it is where the person against whom the order is sought has facilitated the wrongdoing, s/he therefore comes under a duty to assist the person who has been wronged by providing full information and disclosing the identity of the wrongdoers.⁷³ The said procedure has been successfully used in removing anonymity of Internet users where the applications have been made against website hosts where users have made defamatory remarks on the website forums.⁷⁴ These applications have been successfully made on sites hosted outside the UK.⁷⁵

The decision of Justice Eady in the High Court in England and Wales *The Author of a Blog v Times Newspaper Limited*⁷⁶ raised fundamental questions surrounding the arguments in the protection or disclosure of a blogger's identity. The ruling by the court that the blogger *NightJack* could not have a reasonable expectation to anonymity was premised on the fact that 'blogging is essentially a public rather than a private activity'⁷⁷ and hence, *NightJack* did not have the right to anonymity. But does the question on protecting anonymity turn on

⁷⁰ Matthew Mazzotta, 'Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers' (2010) 51(3) Boston College LR 833, 855.

⁷¹ *Indep. Newspapers, Inc. v. Brodie*, 966 A 2d 432 (Md 2009) 457; *Mobilisa, Inc. v. Doe 1*, 170 P 3d (Ariz Ct App 2007) 720-721; *Dendrite International Inc. v. Doe No.3*, 775 A 2d (NJ Super Ct App Div 2001)760-61.

⁷² *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943.

⁷³ *ibid* 948.

⁷⁴ *Totalise plc v The Motley Fool Ltd and another* [2001] EMLR 750; *Sheffield Wednesday Football Club Ltd and others v Hargreaves* [2007] EWHC 2375 (QB), [2007] All ER (D) 270 (Oct).

⁷⁵ *Applause Store Productions & Firsh v Raphael* [2008] EWHC 1781, [2008] All ER (D) 321 (Jul); *G & G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), [2009] All ER (D) 92 (Dec); *Lockton Companies International & Others v Persons Unknown and Google Inc* [2009] EWHC 3423 (QB).

⁷⁶ (n 25).

⁷⁷ *ibid*.

privacy or is it rather about promoting or at least not inhibiting freedom of expression or both? The right to anonymity necessitates consideration from the perspective of both freedom of expression and privacy, on the basis that for citizen journalists publishing under the cloak of anonymity, the exercise of the freedom of expression is dependent on the ability to do so privately without having their identity revealed. The decision of the High Court in *NightJack's* case has been criticized for not appreciating the importance of anonymity in particular the privacy rights of Internet users and anonymity as an inducing factor for speech on the Internet.⁷⁸ The decision nevertheless provided an impetus for a more detailed discussion. Much criticism has been levelled against the UK courts' first brush in deciding on the issue of anonymity of citizen journalists. The decision of the High Court in *NightJack's* case has been criticised for not appreciating the importance of anonymity in particular the privacy rights of Internet users and anonymity as an inducing factor for speech on the Internet.⁷⁹

Within this theme, the thesis will explore the discussion that where citizen journalism on the Internet falls within the core activity of the media, it will be held to be accountable to the standards that the media as a whole is accountable; the importance of anonymity for media speakers both historically and in the context of citizen journalism on the Internet; that the protection of anonymity of citizen journalists on the Internet is important in order to uphold the right to freedom of speech and expression in order for such activity to flourish and to contribute to socio-political conversation; the exercise by the courts in balancing competing interests between the rights of individuals to seek redress against actionable communication on the Internet against the right of speakers to speech under a cloak of anonymity; and the discussion on when the decision to disclose the identity of speakers goes against the right of freedom of expression and right to privacy.

⁷⁸ Kirsty Hughes, 'No Reasonable Expectation of Anonymity?' (2010) 2(2) *Journal of Media Law* 169; Eric Barendt, 'Bad News for Bloggers' (2009) 1(2) *Journal of Media Law* 141.

⁷⁹ Kirsty Hughes, 'No Reasonable Expectation of Anonymity?' (2010) 2(2) *Journal of Media Law* 169; Eric Barendt, 'Bad News for Bloggers' (2009) 1(2) *Journal of Media Law* 141

4.4 Public Interest, Responsible Journalism and *Reynolds* and *Jameel* – Principles Applicable to Speech by Traditional Media v Principles Applicable Universally To All Speech

In determining the rights of citizen journalists, a fundamental question that will be addressed is whether speech made by citizen journalists on the Internet is in the public interest realm. The nature of the subject matter of the speech being in the public interest will assist citizen journalists' reliance on principles of the law where such speech is protected namely in the defences of fair comment and qualified privilege against a claim in defamation. In recent years, the development of jurisprudence in the area of qualified privilege as a result of decisions of the House of Lords in *Reynolds*⁸⁰ and later *Jameel*⁸¹ has provided a basis upon which such rights can be determined. These decisions also echo the need for the standards of responsible journalism to be met before the law will accord any protection.

The principles espoused in the protection of traditional media in both judgments in broad terms could provide a starting point for the discussion on the legal treatment of citizen journalists on the Internet. The need for the consideration of extending principles of law is natural in light of the emergence of new communication technologies that have presented new types of activities that require some form of legal regulation and treatment. The subject matter of the regulation is the technology that communicates and the subject matter of communication. The importance in considering how the law is to treat the technology and the communication is dependent in turn to the importance of the information produced and disseminated to the public at large and the right of the public to receive such information. The information produced ranges in terms of value from the trivial to the important, each attracting a different type of readership. Similarly, the credibility of such information equally varies - from the truthful and democratically engaging to the false, distorted, inaccurate, questionable, harmful and nefarious. According to the "marketplace of ideas" theory, truth should be allowed to compete with falsehood and it shall prevail. Could offensive speech be tolerated even when it is truthful? Could a minority view prevail in the marketplace when it is capable of being silenced by a louder majority view?⁸² Could

⁸⁰ (n 40).

⁸¹ (n 40).

⁸² Discussed in Chapter 5.

the benchmark for speech to fall within the realms of “public interest” be when there is acceptance and tolerance of speech such speech? According to Feintuck, the concept of “public interest” could assist in identifying ‘a meaningful overarching rationale for regulation of the media.’⁸³ The difficulty with “public interest” is in defining it, in deciding the level of its provision and whether it is a priority.

One of the fundamental areas where the debate of what is in the public interest frequently raises questions is in the area of media intrusions into the privacy of individuals in particular the question when such intrusions are unwarranted or when they are legitimate when investigative journalists are acting in the public interest. Areas where the courts have had to consider whether a publication falls within the realm of public interest are where the courts are determining the defence of fair comment, in upholding qualified privilege (*Reynolds* and *Jameel* being highlight relevant in this discussion), open justice and prior restraint, anonymity in relation to court procedures and generally the media’s right to receive and impart information without interference under Article 10.

The link between responsible journalism and the landmark cases of *Reynolds*⁸⁴ and *Jameel*⁸⁵ is public interest. *Reynolds*, as discussed above, set out the *Reynolds*-type defence of qualified privilege and the proper approach to be taken by the courts in determining whether the author or publishers had acted responsibly in communicating the information to the public. *Jameel*’s contribution is in clarifying *Reynolds*’ application in particular if the matter published was in the public interest and whether in the context of the whole article, the standard of responsible journalism has been met.⁸⁶ And ‘[I]f the public interest is engaged, the report is privileged if it satisfies the test of responsible journalism.’⁸⁷ Whilst *Reynolds* was decided in the context of a newspaper publication, Lord Hoffman extended the defence to be ‘available to anyone who publishes material of public interest in any

⁸³ Mike Feintuck, *Media Regulation, Public Interest and the Law* (Edinburgh University Press 1999) 57.

⁸⁴ *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127.

⁸⁵ (n 40).

⁸⁶ *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750, 771 (Ward LJ); quoting *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL [44], [48] (Lord Hoffman) and [107]-[108] (Lord Hope).

⁸⁷ *Charman* (n 90) 772 (Ward LJ); quoting *Jameel* (n 90) [53] (Lord Hoffman).

medium.’⁸⁸ And His Lordship adds that the question then turned on ‘whether the defendant behaved fairly and responsibly in gathering and publishing the information.’

Within this theme, the thesis will explore the extension of the principles developed in *Reynolds* and *Jameel* to citizen journalism on the Internet; and whether the law provides assistance in the determination of the type of speech which is in the public interest realm.

5. Research Methodology

The legal research will be essentially library-based and literature based which include legislation, cases, journal articles books and news articles. The methodology will include theoretical analysis, doctrinal legal research and, in view of the nature of the research which is led and influenced by technology and the media, interdisciplinary research.

5.1 Theoretical and conceptual framework

An examination of orthodox legal doctrines will be undertaken in Chapter 2. Consideration of certain theories to help develop a comprehensive and cohesive analysis will assist in drawing out the integrity and validity of the legal responses recommended. In identifying which theory or theories will require consideration, initial reading of media theorists show repeated references to a number of them. The theories are grouped in four categories – firstly, the early media theories which include the mass society theory, Marxism and the liberal theory of press freedom premised on Milton,⁸⁹ Locke⁹⁰ and Mill;⁹¹ secondly, the contemporary theories which include Habermas’s⁹² public sphere, and, deliberative democracy⁹³ and public journalism;⁹⁴ thirdly, the marketplace of ideas theory which is influenced by jurisprudence espoused first by the US Supreme Court justices, namely,

⁸⁸ *Jameel* (n 86)[54] (Lord Hoffman).

⁸⁹ John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).

⁹⁰ John Locke, *Second Treatise of Government* (1689); *A Letter about Toleration* (1689).

⁹¹ John Stuart Mill, *Of Liberty of Thought and Discussion* (1859).

⁹² Jürgen Habermas, *The Structural Transformation of the Public Sphere* (1962); *The Theory of Communicative Action* (1981); *Moral consciousness and communicative action* (1983).

⁹³ John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (OUP 2006).

⁹⁴ Linda Steiner and Jessica Roberts, ‘Philosophical linkages between public journalism and citizen journalism’ in Stylianos Papathanassopoulos (ed), *Media Perspectives for the 21st Century* (Routledge 2011); Jay Rosen, *What are journalists for?* (Yale University Press 1999); Davis Merritt, *Public journalism and public life: Why telling the news is not enough* (Lawrence Erlbaum 1998); Arthur Charity, *Doing public journalism* (Guildford 1995); Tanni Haas, *The Pursuit of Public Journalism: Theory, Practice and Criticism* (Routledge 2007); Jay Rosen, *Getting the connections right: Public journalism and the troubles in the press* (Twentieth Century Fund Press 1996).

Holmes J in his dissenting judgment in *Abrams v US*;⁹⁵ and finally the dialectic in journalism theory.⁹⁶ The salient points and fundamental themes drawn from these theories will be insightful in drawing legal propositions relevant to citizen journalism on the Internet.

5.2 Doctrinal and analytical framework

Review of primary and secondary legal sources will be undertaken. A review of constitutional doctrines that espouse related freedoms to freedom of information and media will be explored. Reference to existing literature in the area is incorporated throughout the thesis.

Legal research methodology will include the review of constitutional principles which act as the cornerstone for the freedom of expression and speech in the US, the UK and Malaysia. The direction and position of the legal environment in the development of rights and responsibilities of citizen journalism on the Internet in Malaysia will be led with reference to the position in the US and UK.

The extent of protection of media rights stems from the protection of fundamental rights and freedoms, namely speech and expression. Therefore, the legal exploration of rights and responsibilities as well as development of legal norms in relation to citizen journalists will be based on the study of the following: firstly, the US constitutional provisions – where the First Amendment and the scope of the First Amendment expounded on by the US Supreme Court is seen as one of the more generous provisions which have protected the media as a vital channel of speech; the UK where the European Court of Human Rights in Strasbourg has prescribed a clear standard in deciding the scope and protection under Article 10 of the European Convention of Human Rights; and Malaysia, where in spite of freedom of speech being protected under Article 10 of the Federal Constitution, media rights remain an unfilled legal basin.

⁹⁵ 250 US 616 (1919) 630-31.

⁹⁶ John C Merrill, *The Dialectic in Journalism: Toward A Responsible Use of Press Freedom* (Louisiana State University Press 1989).

Reference to the US First Amendment is an essential start of the debate of the place of the media in the context of the freedom of speech. The First Amendment is seen as the higher ideal in providing the widest latitude to freedom of speech and where the media has enjoyed a preferred position. Although the wording of the First Amendment appear to be absolutist at first glance, the Supreme Court has however qualified this right albeit imposing on the government the duty to provide substantial justification for any interference with this freedom illustrated through the court's developed jurisprudence. The position in the UK makes it a relevant study where Article 10 of the European Convention of Human Rights requires the courts to undertake a balancing exercise by virtue of the limitation of the said Article by virtue of Clause 2. The restriction of the freedom of speech in Malaysia is more along the lines of the European model, the distinction being the extent of restrictions imposed. These rights and their restrictions will be explored in Chapter 5.

5.3 Interdisciplinary research

The research of the legal questions is dependent on the understanding of the technology, which has provided the impetus for legal research in a new and developing area of the law – the Internet and social media platforms enabled by Web 2.0, and the media, which is the subject matter of the research – the key player in publishing, communicating and distributing news and information. Reference to secondary sources related to the technology and the media such as books, journal articles and news articles will be extensive as these will provide an insight into historical, theoretical and contemporary commentary.

6. Structure of Thesis: Outline of Chapters

6.1 Chapter Two – Theorising Citizen Journalism

Chapter 2 aims to place the legal discussion on rights and privileges of citizen journalism on the Internet to be undertaken in the proceeding chapters in the context of relevant theoretical understanding, rationale and reasoning. The engagement with the theories is in relation to the salient points and fundamental themes recurring through these theories relevant to media studies. The selection of the theories was on the basis that the discourse around these theories prevailed in media studies and media theory and these theories were key theories that inform debates about the media. It is essential in the context of the thesis that any practical legal proposition in the treatment of citizen journalism is underlined by

consideration of schools of thought that prevail in media theory. The chapter is divided into three sections - the first section considered the "Early media theories" comprising of the mass society theory, Marxism and the liberal theory of press freedom encompassing a discussion on Mill; the second section considered the "Contemporary theories" comprising of Habermas's public sphere, deliberative democracy and public journalism; and the last section considered the "Marketplace of ideas theory". The chapter ends with a dialectic approach to journalism according to John C Merrill and a consideration whether this approach is the best in the context of the evolution of media, in particular social media and citizen journalism on the Internet.

6.2 Chapter Three - Media and Evolution: Historical Precedence of Citizen Journalism on the Internet

Chapter 3 sets out the evolution of media and journalism from the time of the printing press to the introduction of participatory journalism on online news websites. The historical development of the media and its medium sets out a narrative of the way in which the media first emerged as a transmitter of news to its role in setting public and political agendas. The political theory of deliberative democracy is introduced in relation to public journalism as a means of facilitating democratic discourse. With the interaction between technology-enabled platforms and social change, participatory journalism encourages readers in the shaping of news and appears as the turning point of the next phase of the changing nature of journalism. The chapter draws in correlation between public journalism with participatory journalism.

6.3 Chapter Four – Citizen Journalism and New Media

Chapter 4 picks up on the changing nature of journalism from the preceding chapter - the ability to enable citizens and readers to present their opinion in something more individually generated such as citizen journalism. It will encompass the nature and characteristics of citizen journalism in particular highlighting deficits in mainstream media that led to its emergence and the characteristics that differentiate traditional media from citizen journalism. It will identify the technology-and communication-driven platforms that enable this type of journalism. And finally, setting out several of the key uncertainties, critique and challenges faced by citizen journalism.

6.4 Chapter Five – Rights and Responsibilities of the Media

Chapter 5 enquires into several of the areas that accord journalists and media certain rights and privileges under the law as well as covering areas of accountability imposed by the law and professional codes. The chapter begins by looking at several international conventions and documents before considering the current legal framework in the US, the UK and Malaysia. The starting point of the latter discussion is the basis upon which the media rights are based – the rights to free speech and expression – in the US, the UK and Malaysia. The chapter will first look at the constitutional framework in the UK, US and Malaysia specifically on the extent the freedom of speech and expression is enshrined in the said framework. The chapter will review whether these benefits and standards can be extended to citizen journalists on the Internet.

6.5 Chapter Six – Specific Issues Affecting Citizen Journalists on the Internet

Chapter 6 will raise several debates in relation to the legal rights of social media and citizen journalism on the Internet that will need new legal norms to be devised. These require a special and separate discussion or treatment from professional journalists. Some of the points discussed are whether citizen journalists are to be given the same or equal rights as professional journalists, the preliminary question is whether they are 'journalists'. It is therefore essential to enquire how the law, both legislation and the case law, recognizes the 'journalist'. If the citizen journalist-blogger is performing the function of a journalist, can s/he resort to the same protection the law accords, such as shield laws, to journalists attached to mainstream traditional media entities? A further question that will require discussion is whether the blogger will benefit from the labelling of a blogger as a journalist or would it impose restrictions and limitations on the blogger? Further, the importance of anonymity is essential in protecting the identity of citizen journalists from being revealed. The cloak of anonymity on the Internet encourages democratic discourse. If anonymity is removed, it will impede the activity. Can the right to anonymity hinge on freedom of expression and/or the right to privacy? The paradoxical situation is evident that anonymity fosters both expression and privacy but the possible conflicts between the two are equally evident. Consideration of whether the citizen journalist who wishes to do so under the cloak of anonymity could be protected as a confidential source when the citizen journalist is functioning both as a journalist and a source of the information is also addressed.

6.6 Chapter Seven – Conclusion

The chapter draws together the principal themes and findings of the research.

Chapter 2

Theorizing Citizen Journalism

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1. Introduction

The aim of this chapter is to place the evolution of media, to be undertaken in Chapters 3 and 4, and the legal discussion on rights and privileges of citizen journalism on the Internet, to be undertaken in Chapters 5 and 6, in the context of relevant theoretical understanding, rationale and reasoning. It was set out in the introductory chapter, Chapter One that the research methodology would include a theoretical and conceptual framework where several theories would be considered to help develop a comprehensive and cohesive analysis in drawing out the integrity and validity of the legal responses discussed in the later chapters. The engagement with the theories will be in relation to the salient points and fundamental themes recurring through these theories relevant to media studies. It will be beyond the

scope of the thesis to engage with the merits of the theories except in the context of their relevance to social media activity and citizen journalism on the Internet.

The selection of the theories is on the basis that the discourse around these theories prevailed in media studies and media theory and these theories are key theories that inform debates about the media, both in the past and present. It is essential in the context of the thesis that any practical legal proposition in the treatment of citizen journalism is underlined by consideration of schools of thought that prevail in media theory. Media theory as a subject, according to Inglis, is a version of political theory which is a matter of trying to work out how the world works and how it ought to work.¹ Inglis commented that, 'At its heart, in other words, are the connections between theory and practice, thought and action, knowledge and virtue.'² The link between politics and media is made when the media acts as the mediator by acting as the public communications system between relations that are central to politics. Politics, which has its preoccupation with power in the study of the public realm and our relations to one another in public, relies on the media for its sustenance, and in the context of citizen journalism engaging through social media platforms on socio-political issues, this interplay between politics and the media takes place.

The chapter will be divided into three sections discussing one or more theories in each section with further subsections on individual theories. The first section, in Heading 2, will consider the "Early media theories" comprising of the mass society theory, Marxism and the liberal theory of press freedom which will encompass a discussion on Mill. The second section, in Heading 3, will consider the "Contemporary theories" comprising of Habermas's public sphere, and, deliberative democracy and public journalism. In the last section in Heading 4, the "Marketplace of ideas theory" as propounded by Holmes in his dissent in *Abrams v US*³ will be considered. In Heading 5, the dialectic approach in journalism will be highlighted as the preferred approach.

The chapter demonstrates the extent to which the theories are applicable to the contemporary phenomenon of citizen journalism on the Internet whereby several may not have waned in application but others may need to be qualified in application.

¹ Fred Inglis, *Media Theory: An Introduction* (Basil Blackwell 1990) 18.

² *ibid.*

³ 250 US 616 (1919).

2. Early media theories

2.1 Mass society theory

With the arrival of modernity, discussed below, in western societies, the birth of mass media through widespread circulation of newspapers, the rise of cinema and development of radio through the 19th century and the turn to the 20th century, led to concern being expressed by the elites on the rise of the “masses”. The rise of the masses was perceived as a threat to the social order. This concern was vocalized by Alexis de Tocqueville as early as the 1840s when he wrote that social disintegration was being led ‘by an all pervasive egalitarianism which breeds individualism, materialism and social instability’.⁴ The fear was that democracy would lead to, as Williams puts it, a ‘levelling-down of culture and society and erosion of the influence of the social elites, which traditionally had guaranteed social order.’⁵

Williams paraphrases the effects of modernity, the formation of the “mass” society and the consequences of this mass society as follows:

Modernity was subverting the ‘normal order’, breaking down traditional communities in which people had a sense of belonging and a sense of their place in the overall scheme of things. Traditional communities were being replaced by a new society in which people were simply a mass of individuals isolated from one another and from the social ties that bound them together – this society is labeled ‘mass society’. The severing of traditional social ties and orientations, it was argued, rendered the individual more isolated, with the effect that he or she was more vulnerable and more susceptible to the most base and trivial instincts and emotions being peddled by, amongst others, the new mass political movements and media.⁶

It is not a coincidence that the rise of mass media coincided with the growth of the idea of “mass society” such as the mass circulation of newspapers. The assumption made under the theory was that the media had a negative and disruptive impact on people and society.

⁴ Quoted in Alan Swingewood, *The Myth of Mass Culture* (Macmillan 1977) 3.

⁵ Kevin Williams, *Understanding Media Theory* (Hodder Arnold 2003) 24.

⁶ *ibid.*

The mass society theory developed in the 1930s and 1940s with one of its prominent architects, Ferdinand Tönnies. Tönnies's concept pivots on the distinction drawn between the traditional society and the modern one. Where traditional society was bound by 'reciprocal, binding sentiment...which keeps human beings together as members of a totality',⁷ modern society comprised of individuals where 'everybody is by himself [sic] and isolated, and there exists a condition of tensions against all others...everybody refuses to everyone else contact with and admittance to his sphere i.e. intrusions are regarded as hostile...nobody wants to grant and produce anything for another individual, nor will he be inclined to give ungrudgingly to another individual.'⁸

This was further developed by Emile Durkheim, who retained the distinction between traditional society from modern society but with a slight difference from Tönnies. Durkheim felt that traditional society relied on 'mechanical solidarity' where individuals were forced to perform their roles whereas in modern society, individuals had more freedom but also had a 'collective conscience' and a respect for 'social facts' to maintain harmony.⁹

Both these sociologists felt that mass society would lead to society not being able to contain individual desires and needs. The mass society theory treated the media as a disruptive force in society, influencing the attitudes and behaviour of ordinary people who were seen as vulnerable to the power of mass media, resulting in a decline in cultural standards and values promoting ideas and activities that threaten civilized behaviour¹⁰ but it was not deemed to be a proper media theory as it did not focus on the content of media and its impact in the delivery of the said content.¹¹ The theory has been dismissed as "elitist nostalgia" although we see pockets of optimism in the work of Durkheim who saw new forms of social relations amongst the masses as an improvement.¹²

The analysis of individuals in this mass society suffering from the effects of media was as Williams put it, 'derived from speculation about human nature rather than empirical observation based on research'.¹³ As its weaknesses became apparent, the theory became

⁷ Quoted in Melvin De Fleur and Sandra Ball-Rokeach, *Theories of Mass Communication* (Longman 1989) 153.

⁸ *ibid* 154.

⁹ (n 5) 26.

¹⁰ Stanley Baran and Dennis Davies, *Mass Communications Theory* (Wadsworth 1995) 41-50.

¹¹ (n 5) 23-29.

¹² (n 5) 26.

¹³ (n 5) 28.

unpopular. However, the theory is conveniently referenced when the media itself, both press and television, attempts at the causes of some of the ills in society with reference to the negative effects of other elements in media such as movies and the Internet on the behaviour and conduct of individuals.

The mass society theory's good intentions of protecting the public from the influence of the media, is seen in C W Mills work. Mills states that the American public is 'the seat of all legitimate power' and 'held to be the very balance wheel of democratic power',¹⁴ hence, attributing the public with a role and power which is essential in a liberal democracy. Mills speaks of the nature of two communities or two types of differing societies. The first is the "public" - a community which is a type of public sphere:

In a *public*, as we may understand the term, (1) virtually as many people express opinions as receive them. (2) Public communications are so organized that there is a chance immediately and effectively to answer back any opinion expressed in public. Opinion formed by such discussions (3) readily finds an outlet in effective action, even against – if necessary – the prevailing system of authority. And (4) authoritative institutions do not penetrate the public, which is thus more or less autonomous in its operations. When these conditions prevail, we have the working model of a community of publics, and this model fits closely the several assumptions of classic democratic theory.¹⁵

The "mass" is a mass society controlled by a power elite and a mass media which has reduced society to "mere media markets". In a "mass":

...(1) far fewer people express opinions than receive them; for the community of publics becomes an abstract collection of individuals who receive impressions from the mass media. (2) The communications that prevail are so organized that it is difficult or impossible for the individual to answer back immediately or with any effect. (3) The realization of opinion in action is controlled by authorities who organize and control the channels of such

¹⁴ C Wright Mills, 'The mass society' in C Wright Mills (ed), *The Power Elite* (OUP 1956)).

¹⁵ *ibid.*

action. (4) The mass has no autonomy from institutions; on the contrary agents of authorized institutions penetrate this mass, reducing any autonomy it may have in the formation of opinions by discussion.¹⁶

Both communities whilst not being real at the time of writing are used to demonstrate that the power elite exists, controlling the American society. Whilst Mills' ideas were used theorising the impact of the power elite on citizens during the period of his writings, these ideas continue to be used to draw emphasis on the need for community media – where there is an interest in the public and not markets and where there is an interest in citizens and not consumers.¹⁷

Social media and the use of it by citizen journalists in socio-political conversation seem to exemplify to a certain degree the community of “public” as perceived by Mills as opposed to the “mass” society. Whilst the types of societies may seem poles apart, the phenomenon of citizen journalists on social media platforms or the Internet in general, appears to lean more towards a community of “public” as a result of the technology allowing UGC and interactivity where an opinion or comment and a response thereto can be made immediately upon an event taking place. The phenomenon perhaps has achieved to a certain degree the ability of the opinion to find an ‘outlet in effective action’ in Mills’ third characteristic but not completely. In respect to its fourth characteristic, penetration of authoritative institutions in discussions generated by citizen journalists varies as it is dependent on several factors, namely, the extent of the guarantee of free speech and expression and censorship of the Internet.

Discussion of the mass society theory in this way is revealing as it aims to create the media as a power elite with the potential to remove autonomous thought and opinion forming on the part of individuals. The validity of the mass society theory has perhaps re-emerged in recent times as contemporary debate about the quality and value of news that has become prevalent. The original concern of the theory by the elites on the rise of the “masses” which was perceived as a threat to social order re-emerges as being relevant and applicable in the present day. This emergence relates to the present concern of governments and

¹⁶ *ibid.*

¹⁷ Nicholas W Jankowski & Ole Prehn, *Community Media in the Information Age: Perspectives and Prospects* (Hampton Press 2002).

mainstream media entities of the rise of the voices of the citizen journalists on the Internet through social media platforms. Citizen journalism on the Internet which contributes to socio-political matters and issues of public interest appear to remove the power from the power elites and revert to the concept of “public”, as forwarded by Mills. This is a public that expresses opinion and receives them through platforms which are facilitated by Web 2.0. Web 2.0 and its platforms evolve into tools of public communication that provide the ability to communicate immediately and effectively, and, to reply to any opinion expressed. Citizen journalism on the Internet through social media has the ability in helping society to arrive at a “collective conscience” as perceived by Durkheim.

2.2 Marxism

Whilst there is an absence of a Marxist theory of the media, Marxism has helped in theorizing media.¹⁸ The relationship between media and Marxism can be located within Marx’s work where the relationship is identified as being between, on one hand, the operation of the capitalist economy, and on the other, communication and culture. Marx’s view on this can be found in the following passage:

The ideas of the ruling class are, in every age, the ruling ideas: i.e the class, which is the dominant material force in society, is at the same time its dominant intellectual force. The class which has the means of material production at its disposal, has control at the same time over the means of mental production...Insofar as they rule as a class and determine the extent and compass of an epoch, they do this in its whole range, hence among other things they regulate the production and distribution of the ideas of their age; thus their ideas are the ruling ideas of the epoch.¹⁹

The control of the ‘production and distribution of ideas’ lies with the capitalist class as a result of their control of the ‘means of material production’. This leads to the creation of a ‘false consciousness’ in the minds of other classes as it is the capitalist class’s ideas, views and accounts that dominate society and become the dominant ideology of society. The ideological domination shapes the thinking and acts of the working class and is important in

¹⁸ Hans Magnus Enzensberger, ‘Constituents of a theory of the media’ in Denis McQuail (ed), *Sociology of Mass Communications* (Penguin Books 1972), 100.

¹⁹ Karl Marx and Friedrich Engels, *Selected Works* (Lawrence and Wishart 1974) 64-65.

maintaining the inequality between the classes.²⁰ The domination of economic organizations in society leads to the ideological domination of society. Marx explains the relationship between economy and ideology through his “base-superstructure” model where the base is the economic foundation of society and the base determines the superstructure of society comprising of political, social and ideological institutions. The media is seen as being a product of the economic base.

Miliband’s analysis of Marx and the media is predominantly restricted to Britain and the media of his time - the press, radio and television. According to Miliband, Marx led us to view the media as a means of promoting a certain ideology in that a certain set of views, values and ideas, held by the capitalist class which excluded or derided alternative and oppositional ideas.²¹ Miliband speaks of the media as a ‘weapon in the arsenal of class domination’:

Given the economic and political context in which they [the mass media] function, they cannot fail to be, predominantly, agencies for the dissemination of ideas and values which affirm rather than challenge existing patterns of power and privilege and thus to be weapons in the arsenal of class domination.²²

Miliband takes issue with the fact that there is an assumption that power is equally distributed in western societies with no one individual, group or class enjoying a dominant position. Miliband refers to the media as one of the institutions that holds a dominant position in society. This may be true of traditional mainstream media. How different is social media from traditional mainstream media? Does it hold that dominant position in society controlled by the few, the capitalist class perhaps?

Social media allows individuals to contribute to national and international conversation and news where previously the traditional mainstream media was seen to possess a dominant position. Permeation of social media in eroding this dominant position may vary from state to state depending on a variety of factors chiefly the permeation of technology, pluralism of

²⁰ Peter Golding and Graham Murdock, ‘Capitalism, communication and class relations’ in J Curran, J Marriott, M Gurevitch, J Wollacott and C Roberts (eds), *Mass Communication and Society* (Edward Arnold 1977) 15.

²¹ Ralph Miliband, *The State in Capitalist Society: The analysis of the western system of power* (Quartet Books Limited 1973) 211.

²² *ibid.*

traditional media and, as increasingly seen in the Arab Springtime revolution of 2011, the democratic struggle. Where Miliband spoke of the mass media functioning in a way that did not challenge existing powers of pattern, however, citizen journalism on the Internet seems to function differently and at times in a diametrically opposed fashion where socio-political conversation is generated as an alternative source of news and information, allowing individuals to directly challenge the dominant viewpoint of the mainstream media or the government.

Whilst the popularity of socio-political debate and discussion on social media platforms may erode the domination of economic organizations, a new capitalist class may be emerging comprising of owners of providers of social media platforms. This discussion however is beyond the scope of this thesis but is nevertheless seen as a threat to social media speech and certainly merits further discussion.

2.3 The liberal theory of press freedom

Much of the importance of citizen journalism rests on its role in promoting freedom of speech. The jurisprudence on the importance of freedom of speech is drawn from the need to have channels of free speech. The press is seen as one of these channels and it was only natural for the scholars of media theory to take the writings of Milton,²³ Locke²⁴ and Mill,²⁵ and categorise them as the liberal theory of press freedom. The theory is one of the strongest cornerstones for press freedom and has been extrapolated by the US Supreme Court in articulating its marketplace of ideas theory, discussed in Heading 4, *infra*.²⁶ John Milton published his famous unlicensed pamphlet, *Areopagitica*,²⁷ seen as 'the first statement of the liberal view that in a free market of ideas, the good will supplant the bad and that all intelligent people need is access to the fullest expression of ideas for they themselves to distinguish the former from the latter.'²⁸ Milton opposed state restrictions of freedom of expression as it removed the choice of individuals to make their own judgements of what they read. The importance of open discussion to the discovery of truth

²³ John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).

²⁴ John Locke, *Second Treatise of Government* (1689); *A Letter about Toleration* (1689).

²⁵ John Stuart Mill, *Of Liberty of Thought and Discussion* (1859).

²⁶ (n 3) (Holmes J); *Whitney v California* 274 US 357 (1927) (Brandeis J); *Kovacs v Cooper* 336 US 77 (1949) (Frankfurter J). Discussed further in the Chapter *infra*.

²⁷ (n 23).

²⁸ Martin Conboy, *Journalism: A Critical History* (SAGE 2004), 32.

is one of four of the arguments proffered by Barendt²⁹ for a free speech principle. This thought is particularly associated with John Stuart Mill.³⁰ The value of intellectual discussion and the need for all individuals to be able to debate public affairs vigorously is part of the essence of the Millian principle. Mill promoted the values of the free press in his book *On Liberty* (1859). In the opening line of the second chapter of his book titled *Of the liberty of thought and discussion*, Mill sets out the role of the press or media in keeping a check on the state:

The time, it is hoped, is gone by when any defence would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrannical government.

Mill advocates that the opinion of each person is valuable and this opinion can be valued by other individuals and society to be either true or untrue. If it is untrue, it provides an opportunity for a truth to emerge. Mill comments as follows:

If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error...

Curran³¹ summarised the theory as one that holds that 'the freedom of the press is rooted in the freedom to publish in the free market' and adds that the press therefore serves democracy in three ways – in informing the electorate, the watchdog role of overseeing and checking on the government and articulating public opinion.

The emergence of the truth being regarded as the most overarching importance of free speech may not always be justified. Barendt assists on this point when he comments that perhaps certain statements need to be suppressed when they do not promote other equally important values such as racist and hate speech.³² He further adds that Mill's proposition may have 'overvalued intellectual discussion' assuming that all individuals are capable of

²⁹ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 6-7.

³⁰ John Stuart Mill, *On Liberty* (1859), Chapter II 'Of Liberty of Thought and Discussion'.

³¹ James Curran, 'The liberal theory of press freedom' in James Curran and Jean Seaton (eds), *Power Without Responsibility: Press, Broadcasting and the Internet in Britain: Press and Broadcasting in Britain* (5th edn, Routledge 1997) 287.

³² (n 29) 8.

debating public affairs.³³ All individuals should have the opportunity to debate public affairs whether or not they possess the “capability”.

Arguments to defend the role of the press and the media in democratic states often draw their merits from the liberal theory of the press. There are four distinguishable but overlapping arguments expanded on by Keane.³⁴ The first is the theological defence where Keane makes particular reference to Milton’s *Aeropagitica* where he ‘pleaded for a free press in order to let the love of God and the “free and knowing spirit” flourish’³⁵ and that restrictions on the press were ‘repugnant because it stifles the exercise of individual’s freedom to think, to exercise discretion and to opt for a Christian life’.³⁶ The basis of the second argument is rights of individuals premised on writings of Locke,³⁷ Tindal³⁸ and Asgill³⁹ whereby the right of the individual not only includes the right to decide matters of politics or religion but the right to express views freely including views that may not accord with those of the government.⁴⁰ The third argument is based on the utilitarian theory where the control of the press by the government which nullifies public opinion reduces the happiness of people. The sentiments are that a free press is an ‘ally of happiness’ checking on government.⁴¹ Keane’s last argument is based on the attainment of truth whereby truth can be attained through unrestricted and free discussion drawing this argument’s strength from Mill’s *On Liberty*.

If social media activity is viewed as contributing to valuable intellectual discussion and allowing individuals to contribute to the debate on public affairs, it certainly demonstrates a core value of Millian principle - perhaps not directly emanating from Keane’s first theological argument but certainly with the second through to the fourth. Social media speech made by citizen journalists squares neatly against Keane’s second argument as the right to speech is a right of the individual, with his third argument that it has the utilitarian value of increasing the happiness of people as it provides an effective avenue to magnifying

³³ (n 29) 9.

³⁴ John Keane, *The Media and Democracy* (Polity 1991).

³⁵ *ibid* 11.

³⁶ (n 34) 12.

³⁷ John Locke, *A Letter about Toleration* (1689).

³⁸ Mathew Tindal, *Reasons Against Restraining the Press* (1704).

³⁹ John Asgill, *An Essay for the Press*, 1712.

⁴⁰ (n 34) 13.

⁴¹ (n 34) 16.

the voice of public opinion and finally with the fourth argument, the ability to debate, share and more importantly interact through commenting on postings on blogs, *Facebook* pages, online articles on websites and video postings on *YouTube* which allow for the possibility of attaining the truth through a process of validation or challenge. A posting's credibility can be checked against the comments made in response to it and the share facility⁴² allows the posting to be distributed even more widely - exposing it to a wider audience.

Revisiting Barendt's cautionary comment on suppression of speech, which may not promote important values of free speech, which is equally important as the emergence of truth in speech that does, the same caution is to be directed at speech generated by citizen journalists on the Internet. The important value of free speech is to be discerned equally when protecting speech generated by citizen journalists and the same measurement to filter through the said speech must be undertaken to determine between speech that contributes to socio-political debate and speech that goes against the grain of sanctifying the discovery of truth.

3. Contemporary theories

3.1 Habermas's Public Sphere

Habermas's⁴³ propositions of the public sphere and communicative action are a vital reference in any study of media theory. Writers such as Peters⁴⁴ have linked Habermas's understanding on democracy and the public sphere to the American notion of the marketplace of ideas, discussed in Heading 4, *infra*. Media theorists have often referred to two of Habermas's volumes of work, namely, *Theory of Communicative Action* and *The Structural Transformation of the Public Sphere*. The need and maintenance of a "political public sphere" seem to strengthen the idea that perhaps the Internet has come to represent that political public sphere, for at least some countries. This idea that the Internet could be the new public sphere is a change from the traditional one that Habermas was referring to.

⁴² The share facility or tool allows users to disseminate a particular news or blog post to other social media platforms.

⁴³ Jürgen Habermas, *The Structural Transformation of the Public Sphere* (1989); *The Theory of Communicative Action* (1981); *Moral consciousness and communicative action* (1983).

⁴⁴ John Durham Peters, 'Distrust of representation: Habermas on the public sphere' (1993) 15(4) *Media Culture and Society* 541.

The public sphere is a space, independent of government, where individuals can debate public affairs.

Habermas provides two accounts of the public sphere - one in the 17th and 18th centuries where the educated and bourgeois class were able to debate, interact and engage with each other in coffee houses, universities and newspapers. This public sphere had three characterizations where participations were treated equally, debating issues rarely engaged with by the noble class and finally, 'everyone had to *be able* to participate'⁴⁵ as having both, an opportunity to participate and the capability to participate. The second account of the public sphere emerges from the 19th century where public opinion is influenced by advertising and public relations. As Williams comments:

For Habermas the refeudalised public sphere is a 'faked version'; polluted by the lobbying culture of the twentieth century and simply a forum for 'displays of power' rather than the exchange of ideas and sharing of outlooks.⁴⁶

For Habermas, 'The world fashioned by the mass media is a public sphere in appearance only'⁴⁷ with advertising and public relation spin that has resulted in a diluted public sphere referring to it as the psychological techniques of opinion management:

The sender of the message hides his business intentions in the role of someone interested in the public welfare. The influencing of consumers borrows its connotations from the classic ideas of a public of private people putting their reason to use and exploits its legitimations for its own ends. The accepted functions of the public sphere are integrated into competition of organized private interests.⁴⁸

The main criticism of Habermas's description of the public sphere is the non-inclusive nature of the working class and minorities. By analogy, it is this precise criticism that is made against the mass media that has resulted in the Internet taking its place as a new public sphere. Nevertheless, Habermas's "public sphere" is relevant in media discourse particularly

⁴⁵ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity 1989) 37.

⁴⁶ (n 5) 69.

⁴⁷ (n 45) 171.

⁴⁸ (n 45) 193.

when the mass media have usurped the role as the chief institutions of the public sphere. Williams suggests that this attraction stems from the focus on the political dimension of the media and the relationship that the media has with democracy and political process.⁴⁹ The “public sphere” is the forum that mediates between the state and society where private individuals can debate public affairs and question authorities. In order for these activities to take place, there must be free flow of information and hence, media entities play an effective role in facilitating this free flow of information. The task of journalism is ‘to make information publicly available’,⁵⁰ this being ‘one basic ingredient of the public sphere...required for public participation in discussion and decisions’. In each country, there is a need to evaluate whether the media represents a properly functioning “public sphere” – as Habermas calls it - that communal communicative space in which ‘private people come together as a public’.⁵¹

Habermas articulates his concept of the public sphere as follows:⁵²

By “the public sphere” we mean first of all a realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens. A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body...Citizens behave as a public body when they confer in an unrestricted fashion – that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions – about matters of general interest. In a large public body this kind of communication requires specific means for transmitting information and influencing those who receive it. Today newspapers and magazines, radio and television are the media of the public sphere.

He then explains that the “political public sphere” is one ‘connected to the activity of the state’.⁵³ The state is not part of the political public sphere although the state may create the

⁴⁹ (n 46).

⁵⁰ Klaus Bruhn-Jensen, *Making Sense of the News* (Aarhus University Press 1986) 31; quoted by Brian McNair, *News and Journalism in the UK* (Routledge 1999) 21.

⁵¹ (n 45) 27.

⁵² Jürgen Habermas, Sara Lennox and Frank Lennox, ‘The public sphere: an encyclopedia article (1964)’ (1974) 3(1) *New German Critique* 49-55.

⁵³ *ibid.*

space for this sphere as 'the executor'. Habermas's "political public sphere" is a 'sphere which mediates between society and state, in which the public organizes itself as the bearer of public opinion. This accords with the principle of the public sphere which is the principle of public information which once had to be fought for against the arcane policies of monarchies and which since those times has made possible the democratic control of state activities.'⁵⁴ Habermas also sets out the meaning of the expression "public opinion" referring it 'to the tasks of criticism and control which a public body of citizens informally – and, in periodic elections, formally as well – practices *vis-à-vis* the ruling structure organized in the form of a state.'⁵⁵

If the functioning public sphere is the fulfilment of the communicational requirements of a viable democracy as Dahlgren puts it,⁵⁶ how does the public sphere operate within the scale of the Internet where there is a larger "democracy"? Perhaps the evolution of the medium of the public sphere having evolved from face-to-face communication, to the mass media, can evolve to include the Internet and its various communicative platforms. In this shape and form, the public sphere appears on a scale of outreach from focusing on communication within a community that is local, national or international.

In the context of the research it is a challenge to identify and accord validity to a foundation upon which the standards can be accepted by all who are affected, given the divergent nature of the digital community involved. As Habermas propositioned, the only norms which can claim to be valid are those that meet or could meet with the approval of those who are affected as participants in a practical discourse. The concept of the "public sphere" is frequently commented on. The traditional take of the "public sphere" has to be seen more broadly, some writers suggesting the existence of multiple public spheres.⁵⁷ The latter is said to exist owing to the divergent nature of the media and its continued evolution and even more evidenced in the surge of social media platforms.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Peter Dahlgren, 'The Public Sphere as Historical Narrative' in Denis McQuail (ed) *McQuail's Reader in Mass Communication Theory* (SAGE 2002) 196.

⁵⁷ David Morley, *Home Territories: media, mobility and identity* (Routledge 2000) 110.

Web 2.0 and its ability to allow individuals to have conversations with each and provide input almost immediately could perhaps be envisaged as resembling Habermas's coffee houses in a 21st century setting but only far improved from the 17th and 18th centuries versions owing to its inclusive nature where these conversations could be held by anyone. The ability of technology in neutralizing levels of education, wealth and class, Web 2.0 being the new "political public sphere" also minimises the influence of media as well as blurring the division between capability and opportunity for the public to engage in media-type activities. However, in the context of Malaysia, the public sphere on the Internet is a unique one where not all of the features of Habermas's public sphere exist. Whilst access to the public sphere is guaranteed to all citizens, in that non-censorship of the Internet is guaranteed under the law, there is however no guarantee of freedom to express and publish opinions. These legal issues will be discussed in Chapter 5.

3.2 Deliberative Democracy and Public Journalism

One of the landmark developments in journalism, in the early 1990s in the US, is its attempts at re-engaging with the public in democratic debate and discourse. The level of public participation in open debates of matters of national interest and all forms of democratic processes needed to practise deliberative democracy, which allowed the media to act as the mediator particularly when the media advocated public journalism. Its philosophical antecedent is Habermas's theory of the public sphere.⁵⁸ The school of public journalism holds that a genuine and effective democracy is reliant on a form of journalism committed to promoting active citizen participation in democratic processes.⁵⁹ In furtherance of deliberative democracy, Haas submits that 'journalists would need to change the ways in which they traditionally have conceived of the public and of their own role in public life.'⁶⁰ Hence, the public which has been seen as "thrill-seeking spectators"⁶¹ or "consumers",⁶² needs to be treated as an engaged public, part of a responsible citizenry

⁵⁸ Linda Steiner and Jessica Roberts, 'Philosophical linkages between public journalism and citizen journalism' in Stylianos Papathanassopoulos (ed), *Media Perspectives for the 21st Century* (Routledge 2011) 191, 193.

⁵⁹ Jay Rosen, *What are journalists for?* (Yale University Press 1999); Davis Merritt, *Public journalism and public life: Why telling the news is not enough* (Lawrence Erlbaum 1998); Arthur Charity, *Doing public journalism* (Guildford 1995).

⁶⁰ Tanni Haas, *The Pursuit of Public Journalism: Theory, Practice and Criticism* (Routledge 2007) 4.

⁶¹ Jay Rosen, *Getting the connections right: Public journalism and the troubles in the press* (Twentieth Century Fund Press 1996) 49.

⁶² Davis Merritt, *Public journalism and public life: Why telling the news is not enough* (Lawrence Erlbaum 1998) 140.

who are not only interested in active democratic participation but also capable of participating in the same.⁶³ Public journalism not only creates an *opportunity* for the public to engage but more importantly for those who are indeed *interested* and *capable* of democratic participation.

Public journalism saw its rise in the 1990s in the US when the American public felt a lack of commitment on the part of the mainstream media to citizen participation evidenced by a significant drop in voter participation in elections. Various initiatives were undertaken by America media either radio, television and the press to involve citizens as sources, as collaborators, as reporters - in forums both online and terrestrial. Public journalism however fell out of favour and references are made to its death.⁶⁴ The reasons for this are manifold - namely, the inability to sustain the forums which facilitated the discussion and debate in view of budget limitations and increasing scepticism of the credibility of news organization in the late noughties.⁶⁵ Steiner and Roberts commented that perhaps the fatal blow to the practice of public journalism was citizen journalists who are ironically viewed as having inherited public journalism's philosophy. Citizen journalists on the Internet no longer require traditional media to act as mediators and partners. The take up by citizen journalists to engage in civic and public discourse with other citizens through Web 2.0 technologies can be seen to have revived the school of public journalism – creating a new version – Public Journalism 2.0.⁶⁶

Merritt writing in *Public Journalism 2.0* comments on the effective implementation of public journalism by citizen journalism:

Citizen journalism's core exists in people motivated to tell other people about facts and events they believe are important and exchange thoughts about the meaning of facts and events. That's undoubtedly a form of journalism but also a form of public life, the way democracy is expressed and experienced...Citizen journalism even in its infancy, has avoided at least one

⁶³ (n 60) 4-5.

⁶⁴ Refer to discussion in Chapter 3, Heading 3.5.

⁶⁵ (n 58) 195; Lymari Morales, 'Many Americans Remain Distrusting of News Media' (Gallup, 2009) <<http://www.gallup.com/poll/123365/americans-remain-distrusting-news-media.aspx>> accessed 20 January 2012; Pew Project for Excellence in Journalism, 'Public Attitudes, the State of the News Media Annual Report 2009, <http://stateofthemediamedia.org/2009/overview/public-attitudes/>> accessed 20 January 2012.

⁶⁶ See Jack Rosenberry and Burton St John III (eds), *Public Journalism 2.0: The Promise and Reality of a Citizen Engaged Press* (Routledge 2009).

of the large hurdles originally encountered by public journalism – it is clearly in practice, and its origins are individual and spontaneous. Its practitioners readily accept, even relish the fact that they are involved in public life.⁶⁷

Citizen journalism on the Internet as a form of community journalism appears to effectively revive and implement the practices of public journalism where the citizens are seen as the mediator between the state and other citizens, or between groups and citizens, or purely between citizens. In Chapter 3, as part of the discussion on media and its evolution, public journalism in reshaping the role of journalism and media is revisited.

4. Marketplace of ideas theory

The “marketplace of ideas” theory was originally derived from Mill and was given judicial recognition by Brandeis J and Holmes J in the US Supreme Court.

The “marketplace of ideas” theory of free speech has been enormously influential in the American jurisprudence. Developed by Holmes J in his dissenting judgment in *Abrams v US*,⁶⁸ the theory suggests that the truth would emerge from ‘free trade in ideas’ or intellectual competition and that the regulation by government distorts the working of a free market for the exchange of ideas resulting in the courts undertaking great scrutiny as a result of a mistrust of government intervention even when it is meant to foster free speech.

Holmes J in *Abrams* held that the truth will emerge from a ‘free trade in ideas’:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁶⁹

⁶⁷ Davis Merritt, ‘What Citizen Journalism Can Learn from Public Journalism’ (n 66) 28.

⁶⁸ (n 3) 630-31 (Holmes J).

⁶⁹ *ibid.*

Brandeis J affirmed this in *Whitney*, affirming that the ‘freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.’⁷⁰

In short, if ideas are available and compete with or counter each other, the “good counsels” will prevail.⁷¹ It is essential to note that both Holmes and Brandeis JJ laid out ‘the clear and present danger’ test that may restrict speech in the marketplace whereby speech will not be protected where there is ‘a clear and present danger that will bring about the substantive evils that Congress has a right to prevent.’⁷²

Baker sets out the assumptions that need to be appreciated to assess the theory’s merits. The first assumption is that the truth must be “objective” or “discoverable”.⁷³ Baker explains that the ability of the truth ‘to outshine falsity in debate or discussion’ is only possible ‘if truth is there to be seen.’⁷⁴ The second assumption is that people are rational and that they ‘possess the capacity correctly to perceive truth or reality.’⁷⁵ This assumption is based on further assumptions - firstly, that ‘a person’s personal history or position in society must not control the manner in which he or she perceives or understands the world’ and secondly, ‘people’s rational faculties must enable them to sort through the form and frequency of message presentation to evaluate the core truth in the messages.’⁷⁶ The latter is essential as acceptance of the truth in the marketplace of ideas cannot be based on only perspectives that were more attractively and ‘effectively packaged and promoted.’⁷⁷ The third assumption comprises of several interrelated assumptions. Baker expounds this:

The discovery of truth must be desirable - for example, because truth provides the best basis for action and, thereby, uniformly promotes human interests. If “objective” truth provides the best basis of action, then as humanity progressively finds more truth, the diversity of practice as well as of opinion should gradually narrow. Cultural pluralism should progressively diminish. Moreover, truth would provide the basis for resolving value

⁷⁰ *Whitney v California* 274 US 357 (1927) 375 (Brandeis and Holmes JJ dissenting).

⁷¹ David A Strauss, ‘Persuasion, Autonomy and Freedom of Speech’ (1991) 91 Columbia Law Review 334, 348.

⁷² *Schenk v United States* 249 US 47 (1919) 52, revisited in (n70) 376 (Brandeis J).

⁷³ C Edwin Baker, *Human Liberty and freedom of Speech* (OUP 1989) 6.

⁷⁴ *ibid.*

⁷⁵ *Ibid* 6-7.

⁷⁶ *ibid* 7.

⁷⁷ *ibid.*

conflicts. For objective truth to be the proper basis of action implies that people's real interests do not conflict. In contrast, if truth is not objective or is not the best basis of action, there could be intractable value conflicts. Then the value of the marketplace of ideas would be unclear. Whether robust debate is useful would depend on whether it advanced or obstructed the interests of the group one favors or the group that "ought" to prevail.⁷⁸

The media is often perceived as the marketplace but what is available in the marketplace is very much mediated by the powers that own the media. Therefore regulation of the media is required in order to ensure that varied views and opinions can be heard in the marketplace. This is perhaps the model adopted in liberal democracies but not always the case in legal systems where the media is state-regulated or where there are legal filters on the type of speech that can be disseminated. This variance will be highlighted in Chapter 5.

The platforms utilized by citizen journalism on the Internet *are* representative of "the marketplace of ideas". In terms of social media activity, the ability of individuals to make views available through the various platforms and to have access to varied views ties in with the self-realization value that the theory positions itself on. This is where 'the individual needs an uninhibited flow of information and opinion to aid him or her in making life-affecting decisions, in governing his or her own life.'⁷⁹

5. The Dialectic in Journalism – The feasible approach

Throughout the thesis, a pervasive theme that emerges is that the exercise of freedom of speech and expression that underlies journalism in general, or more specifically citizen journalism on the Internet, comes face to face with two contradicting values – freedom and responsibility. This contradiction presents the dialectic faced by all speech makers. The dialectic is that which exists in reality – a process of unfolding traced to Hegel. According to Merrill, dialectic's basic principle 'is to let the opposites clash and watch the stronger portions of each merge to combine in a new concept that is stronger than either of the original concepts.'⁸⁰

⁷⁸ *ibid.*

⁷⁹ Martin H Redish, 'The Value of Free Speech' (1982) 130 University of Pennsylvania Law Review 591, 618.

⁸⁰ John C Merrill, *The Dialectic in Journalism: Toward A Responsible Use of Press Freedom* (Louisiana State University Press 1989) 12.

Chalybäus characterised Hegel's dialectic into a process of identifying the thesis, the antithesis and synthesis.⁸¹ The process begins with the identification of a reaction as a thesis followed by the antithesis and the synthesis is the resolution between the two contradictions. The contradiction stemming from the responsible exercise of the freedom requires a process of reconciliation. The thesis in the context of journalism is the provision for freedom and the antithesis is the requirement of responsibility through control. The synthesis is the need to find a balance between these two values and 'the ethical use of journalistic self-determination'. This balance is required in the way the legal framework accommodates both these needs and should reflect a moderate initiative in preserving the freedom of journalism as well as imposing standards on how this freedom should be exercised. Freedom, according to Merrill, is 'a state in which a journalist...can determine what to do in his or her situation, what kind of self or journalist unit to become. Freedom, in other words, implies *self-determination* [emphasis added] of what is right and good, and that is where the ethical or moral dimension enters the picture.'⁸² Merrill acknowledges that there are varying meanings to press freedom. He equates "freedom" with "liberty" and these are used interchangeably, and he further expands on these terms in two ways – "negative freedom" which is 'the capacity not to be coerced or enslaved' is a 'freedom to achieve some good' and "positive freedom" which is 'freedom to be a doer or to achieve something' is 'freedom from restraint'.⁸³

In the context of theories discussed in the earlier headings, it is possible to infer that in the course of history, the freedom of the press and media, whether propagated by Mill, Locke, Milton or the US Supreme Court Justices, Holmes and Brandeis JJ, has become established as an important characteristic of a democratic and liberal state. The move from purely freedom of speech to freedom of speech with moral guidance can be seen in, for example, the test of "clear and present danger" set out by Holmes J, discussed in Heading 4, *supra*.

Further, the emergence of the organized profession of journalists saw the formulation of codes whether as a form of soft law or an enforceable code of conduct and ethics.⁸⁴

⁸¹ Heinrich Moritz Chalybäus, *Historische Entwicklung der speculativen Philosophie von Kant bis Hegel : Zu näherer Verstaendigung des wissenschaftlichen Publicums mit der neuesten Schule (Historical development of speculative philosophy, from Kant to Hegel)* (Arnold 1843).

⁸² (n 80).

⁸³ (n 80) 57.

⁸⁴ See discussion on Professional Codes in Chapter 5, Heading 7.

Professional codes can be seen as guiding the journalist, the editor and the publisher to assess their activities in enduring responsible journalism. The law in finding the middle path in the dialectic that faces the media and journalism is evident in the House of Lords decisions in *Jameel* and *Reynolds* where the courts set out the balancing that needs to be achieved between competing interests of the right to freedom of speech and expression and responsible journalism.⁸⁵ Similarly, not all speech by citizen journalists will be seen as equivalent to speech by media entities. The decisions are helpful in determining the limits within which these speech rights will serve to protect speech made by citizen journalists (discussed in Chapters 5 and 6).

6. Concluding Remarks

The theme emerging from these theories is that freedom of speech is a necessary condition for a democratic and just society. The speech maker, whether the professional journalist or the citizen journalist expresses opinions and the public are free to debate, interact and express their own opinions. The citizen journalist is capable of this engagement, because s/he has the opportunity and is able, and in the process removes the elitist idea that perhaps the press was *the* entity capable of this engagement. If the press's freedom is rooted in the freedom to publish in the free market as it serves democracy, then the potential for citizen journalism to do the same must premise on the same. If truth is the most important element to emerge from free speech, then the potential for this to happen is even more probable with interactive social media platforms. The platforms emerge as the "public sphere" meeting the characterization set out by Habermas. But the enlarged democracy of the "public sphere" may result in the need for the important development of ethics and norms which cut across local, national and international values and cultures – an enormous task on any account.

The "marketplace of ideas" theory is in essence descriptive of the type of free trade of ideas carried out by citizen journalists through social media platforms. However, the promoters of the theory were cautious to develop a qualification of such a marketplace in the form of the "clear and present danger" test. This type of qualification is typical of the wordings in Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention of Human Rights. The need for the right to free speech and expression to be a

⁸⁵ See discussion in Chapter 5, Heading 5.5.

qualified one presents the dialectic in not only journalism but in all forms of speech and expression. Any type of speech emanating from the Internet originating from citizen journalists must recognize the important role which they help function and more importantly, the need for such role to be executed with accountability and responsibility as a tool for free speech can equally transform into a tool for hate, anger and abuse. Need for codes applicable to the press that emerged in the 20th century and the recognition of the courts in *Reynold* and *Jameel* on the breadth and width of journalism could provide assistance in developing the right approach in the same sense to citizen journalists in dealing with the dialectic.

The historical view which is particularly helpful in setting out how both the medium and message of the mass media, whether mainstream or otherwise, has evolved over the centuries and recent years will evidence how these media theories impacted on this evolution.

Chapter 3

Media and Evolution: Historical Precedent of Citizen Journalism on the Internet

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1. Introduction - The Rise of Mass Media and the Formation of its Role: Mainstream and Alternative

This chapter is a vital component of the thesis since the thesis aims at contextualising the legal consideration of recognising the rights and responsibilities of citizen journalists on the Internet which can be premised upon the backdrop of the historical contribution of citizen journalism and the rise of the phenomenon. The historical development of mass media and the various mediums used by mass media sets out a narrative of the way in which the media first emerged as a transmitter of news to its role in setting public and political agendas. The

evolution and discussion of the media in the chapter and the thesis is in relation to the mass media.

Citizen journalism on the Internet in its most basic sense is a natural by-product of the evolution of both media and technology. The chapter will demonstrate that whilst the evolution of the mass media is symptomatic of technological advancement, the media's evolution is equally dictated by the role played by media in society and the evolution of this role. The chapter will consider the various factors that have directed the evolution of this role. In terms of the evolution of the various mediums used by the mass media, pamphleteers could be seen as the citizen journalists of their time. Therefore, the historical precedent of citizen journalism on the Internet is pamphlets which were seen as the alternative to the mainstream media such as newspapers.

In addition to the importance of anonymity and pseudonymity in citizen journalism on the Internet, it is also essential therefore to consider in the historical context its existence, usage and its importance. The evolution of the changing role of journalism will set the tone for the direction that led to the phenomenon of citizen journalism on the Internet. The chapter will highlight the emerging themes that will extend to citizen journalism.

The history of the print revolution to the consequent emergence of the mass press in the 19th century as a result of technological and social changes is set out in this chapter. The chapter also tracks the transformation of the media into an online and globalised media in the 21st century.

The other aspect the chapter aims to highlight is the pervasive theme that runs through the evolution of the media which is presently being re-visited with the emergence and popularity of citizen journalists on the Internet. This is namely that individuals have always resorted to different forms of mediums, be it print or the Internet, to channel alternative non-mainstream viewpoints and this need often arises when there is failure on the part of the mainstream media in executing the role which is demanded by its audience.

The conclusion will pull together the themes emerging from the various stages of development in this chapter and relate them to citizen journalism on the Internet.

2. Historical precedent and development of mass media and journalism

2.1 Early beginnings of mass media

It is generally accepted that changes in the media have had important social and cultural consequences. As Briggs and Burke have commented, it is the nature and scope of these consequences which are the more controversial and in the process questioned whether they are primarily political or psychological¹ or alternatively, technological. McLuhan commented that the 'medium is the message'² making it distinct that what was important was not the content of the communication so much as the form that it took. He suggests that it is the medium 'that shapes and controls the scale and form of human association and action.'³

The social history of the media according to Briggs and Burke⁴ can be traced back to the time of "rhetoric" which is the art of oral and written communication studied in the middle-ages and the Renaissance. Innis goes back further and highlights the importance of the media in the ancient world.⁵ Landmarks in the historical development can be seen from the time of the print revolution following the invention of the printing press by Johann Gutenberg around 1450. Samuel Hartlib stated that 'the art of printing will so spread knowledge that the common people, knowing their own rights and liberties, will not be governed by way of oppression'.⁶ Printing attracted conflicting views from praise to criticism whereby some have referred to it as the "agent of change"⁷ whereas the printing of books was the cause of much mischief in the Christian world⁸ attracting much criticism from the Church as religious men were no longer the sole possessors of the Scriptures.

Through time, it has been recognized that journalism has had a range of communication styles and has always had diversity. The word 'journalism' was introduced into the English language from the French in the 1830s. However, before the word was introduced,

¹ Asa Briggs and Peter Burke, *A Social History of the Media: From Gutenberg to the Internet* (2nd edn, Polity 2005) 9.

² Marshall McLuhan, *Understanding Media: The Extensions of Man* (Gingko Press 1964) 7.

³ (n 2) 9.

⁴ (n 1) 1.

⁵ Harold A Innis, *Empire and Communications* (OUP 1950).

⁶ (n 1) 15.

⁷ Elizabeth Einstein, *The Printing Press as an Agent of Change* (Cambridge 1979).

⁸ A comment made by Sir Roger L'Estrange who in the 1660s was the chief censor of books.

‘practices and traditions of this form of public communication had been well established’.⁹ The medium has also evolved from pamphlets, newsletters, to newspapers and now the Internet. In terms of the message, the key thing to note is that journalism has always evolved in function from reporting events, to publishing opinion, reporting news and in gaining ground in social and political thought.¹⁰ As McNair puts it: ‘The journalistic text is viewed as the product of a wide variety of cultural, technological, political and economic forces, specific to a particular society at a particular time’.¹¹ Through history, journalism has sought to transmit ‘direct, topical and powerful’ writing to a wide and regular readership – not unlike Conboy’s description of the role of journalism in John Wilke’s campaign in the 18th century in attacking the government and championing the cause for a free press.¹²

People began to speak of “the media” only in the 1920s although its antecedents were present since the invention of the printing press.¹³ Innis defined “media” as the materials used for communication.¹⁴ Stöber defined “mass media” as ‘media that transport information and communication messages over space and/or time’.¹⁵ This led to the discussion of the ‘communication revolution’ in the 1950s which led to another landmark development of newspapers as the new medium of the media apart from pamphlets, newsbooks and other forms of printed publication utilised as mediums.

According to Habermas,¹⁶ this rise of public opinion and shaping of public consciousness is the rise of the “public sphere”. Habermas identified media as the “public sphere” - a zone for “discourse” in which ideas are explored and a “public view” can be expressed and formed. The relevance of the theory was discussed in Chapter 2. The history of media evidences the rise of the public sphere and political culture. For instance, in Florence in the 13th to the 15th centuries, the squares of the city acted as a “public sphere” where political speeches were delivered and discussed.¹⁷

⁹ Martin Conboy, *Journalism: A Critical History* (SAGE 2004) 1.

¹⁰ (n 8) 1-2.

¹¹ Brian McNair, *The Sociology of Journalism* (Arnold 1998) 3.

¹² (n 9) 82.

¹³ According to the Oxford English Dictionary, as quoted in (n 1) 1.

¹⁴ (n 5).

¹⁵ Rudolf Stöber, ‘What Media Evolution Is: A Theoretical Approach to the History of New Media’ (2004)19 *European Journal of Communication* 483, 484.

¹⁶ Jürgen Habermas, *The Structural Transformation of the Public Sphere* (1962). See Heading 3.1 in Chapter 2.

¹⁷ (n 1) 75.

With the emergence of the newspaper, the role of journalism became central to the discussion of media as tool of dissemination to the masses and to journalism as a profession, discussed later in Heading 3, *infra*.

2.2 Development of Newspapers

The earliest forms of the modern newspaper appeared following the invention of the printing press.¹⁸ The mid-15th century saw forms of printed material carrying news events.¹⁹ The first daily newspaper, *the Liepzig*, came into print in Europe in 1660 in Germany and in England the first newspaper was *the London Gazette* in 1665.²⁰ It was during this period the term “newspapers” came into use.²¹ Print eventually became part of daily life with the emergence of more newspapers in the 18th century which led to the early beginnings of the rise of public opinion.²² The circulation of newspapers in the 18th century was not wide, but because of ‘the perceived importance of newspapers as vehicles for radical political ideas’, governments took legislative steps to limit the press to prevent newspapers becoming ‘a means of spreading radical or revolutionary sentiments that might undermine established authority.’²³ For example, the Stamp Act 1712 in England required newspaper owners to pay stamp duty which increased till the 19th century. The aim of the stamp duty was to increase the cost of the newspaper and hence, the sale price of the newspaper, making it less affordable. This was an attempt to curb the growing power of the press²⁴ in radicalising the masses – an initiative that endorses the Marxist view.²⁵ This duty had no impact in silencing radical ideas when an “unstamped press” prevailed in campaigns.²⁶

In contrast with government reaction to newspapers in England, in the American colonies, the 17th and 18th centuries saw the rapid expansion of the newspaper. Instead of control,

¹⁸ Lyn Gorman and David McLean, *Media and Society into the 21st century: A historical introduction* (2nd edn, Wiley-Blackwell 2009) 6.

¹⁹ *ibid* 7.

²⁰ *ibid*.

²¹ *ibid*.

²² (n 7) 70-72.

²³ (n 18).

²⁴ (n 1) 78.

²⁵ Heading 2.2 of Chapter 2.

²⁶ (n 1) 78.

the right of circulation of news and thought was guaranteed under the First Amendment of the American Federal Constitution.²⁷

The media became concerned with the masses in the early 19th century when newspapers helped fashion national consciousness.²⁸ This was as a result of wider circulation of newspapers as a consequence of increased industrialization, urbanization, technological innovation as well as changes in transportation and education.²⁹ From the time of the printing press, technological advancements again played a vital role in the development of the media. In the 19th century, news-gathering was facilitated by the use of telegraphic messages for news to be transmitted with speed followed by the use of telephone communication. The legislative reform in Britain resulting in the abolishment of advertisement duty, stamp duty and paper duty, in 1852, 1855 and 1861 respectively, also encouraged circulation making papers cheaper. More importantly, the change in legislation in Britain led to the change in the tone of the speech published taking on a more controversial and political role free from censorship or threat of falling under the legal gauntlet of the state machinery.

2.3 Development of Non-mainstream Media: Role of Pamphlets

Alongside the development of the mainstream media, alternative media was developing. Pamphlets were the medium used as an earlier form of individuals participating in generating media.

The history of the media in England, between the 16th to the 18th centuries, informs us that development of new forms of speech, such as pamphlets, were considered non-mainstream or non-conventional but having journalistic attributes, had a considerable impact on the socio-political discourse. Although pamphlets developed alongside other modes of news such as newsbooks³⁰ and newspapers, there were moments in history when pamphlets had a greater influence particularly during the French Revolution, discussed below. The

²⁷ (n 1) 78.

²⁸ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

²⁹ (n 18) 8.

³⁰ Newsbooks are 16th century precursors to newspapers. The coverage was limited to a single story unlike a newspaper where there is coverage of multiple stories and events.

pamphlet, a short, quarto book of 12 sheets when folded once produced 96 pages³¹ came to represent an important vehicle of speech.

In England, in the 16th and 17th centuries, the word “pamphlet” became a useful and meaningful word³² as it connoted a ‘range of expectations’³³ in style, format and content. Pamphleteers responded to writings of other pamphleteers whether in support or as a critique. The content of pamphlets altered over time - from literary, religious and eventually to political. The tone of pamphlets altered over time - from entertainment, information, news, to critical opinion and commentary. Individual pamphleteers were recognised for both good and bad attributes – seen as informative and elucidating on one hand, scandalous and wasteful, on the other.

Role of pamphlets increased in importance as thirst for all news grew whether for distraction or in areas of contemporary interests such as the ‘progress of God’s cause’ from the wars in France in the 1580s and the Thirty Years War.³⁴ Raymond notes the impact of pamphlets in Britain from the 16th to the 17th century:

Popular desire for news was a persistent and compelling force within the business of writing and selling pamphlets in early modern Britain, and printing presses became increasingly committed to the supply of news. The provision of news became more entangled with political commentary, and pamphlets offered strong editorial perspectives. The history of the news pamphlets is inseparable from the history of the news periodical, which loomed larger and larger in the marketplace of print through the seventeenth century, and in turn overshadowed manuscript news. Though merely a dispensable adjunct in the 1580s, news, news pamphlets and newspapers were by the 1680s inseparable from British political culture.³⁵

³¹ Joad Raymond, *Pamphlets and Pamphleteering in Early Modern Britain* (Cambridge University Press 2003) 5, 8. It was defined in the Stamp Act 1712 as having these features for the purposes of taxation but the definition was not novel in any way as this was already the standard practice; see (n 29) 82.

³² *ibid* 7.

³³ (n 31) 39.

³⁴ (n 31) 98-99.

³⁵ (n 31) 99.

Pamphlets were also actively used in the French Wars of Religion between 1614 and 1617 and in the attack of the French government in the 17th century.³⁶ Dutch pamphleteers emerged but in clusters in response to historical events in the 16th and 17th century.³⁷ The political pamphlet came to be part of political life and discourse. The English pamphlet became political at the time of the English Civil War.³⁸

After 1640, it is said that the distinctive nature of pamphlets became more apparent when recognition was given to them as documents of controversial times³⁹ and pamphlets remained popular in the 17th and 18th centuries alongside newsbooks and newspapers with journalists like Marchamont, Nedham and Roger Le'Estrange straddling the varied mediums as both journalists and pamphleteers.

Newspapers were different from pamphlets in terms of seriality, periodicity, sequential, predictability and frequency. Pamphlets were occasional and published when news necessitated it. In the 1640s and 1650s, changing domestic politics increased interest in the news in particular news from Parliament. Parliamentary speeches were printed and distributed as pamphlets. This led to the period of 1641 to 1660 being described as the "printing revolution".⁴⁰

Pamphlets came to be more influential than newspapers in Britain during the French Revolution when the French revolutionary influences were being felt across the channel and pamphlets played a vital part in fuelling debate on socio-political issues.⁴¹ The reason for the greater influence of pamphlets at this time was as a result of the little attention that newspapers displayed in the significant change in the hierarchical nature of society.⁴²

Alongside pamphlets, between 1640 and 1660, the emergence of newsbooks⁴³ reflected the social and political upheavals of its time, reporting on debates and proceedings in

³⁶ (n 1) 70.

³⁷ (n 1) 72.

³⁸ (n 1) 73. Prior to this time, the English pamphlet was more moral than political.

³⁹ Booksellers such as George Thomason began collecting pamphlets in 1640 to 1641 at a time when there were no initiatives for a systematic collection of pamphlets. Similar efforts were made by Anthony Wood, Oxford antiquarian, and John Rushworth, clerk-assistant to the House of Commons. See *supra* n 29, 6.

⁴⁰ (n 31) 202.

⁴¹ (n 9) 87.

⁴² Jeremy Black, *The English Press in the Eighteenth Century* (Gregg Revivals, 1991) 272.

⁴³ (n 31).

Parliament.⁴⁴ It created a 'public channel' for circulating domestic political news besides providing a medium for the delivery of such information which hitherto had existed.⁴⁵ Conboy commenting on the historical and developmental impacts of newsbooks stated that newsbooks 'were to become the most influential political material of the mid-17th century, beyond the combined influences of books, pamphlets, ballads and other means of communication.'⁴⁶ Newsbooks provided an impetus for a 'symbolic leap in attitudes towards the polity'.⁴⁷ Conboy adds that; 'They contributed to the formation of a public discourse which demanded explanations for political decisions, one of the core activities of journalism and a paradigm shift towards the beginning of the modern era.'⁴⁸ One of the key characteristics of newsbooks was that they offered 'continuous communication and commentary on political events'.⁴⁹ Growth of political debate through distribution of printed material surged. As the space of public discourse became increasingly populated, newsbooks were not short of their critics who alleged falsehood in the publication and labelled the newsbooks as being scandalous.⁵⁰

During the popularity of newsbooks, pamphlets were being published and circulated alongside newsbooks. At a time when an attempt was made in 1643 by Parliament to reinstate the authority of the Stationers' Company in an attempt to 're-establishing control over this seemingly free flow of information and political opinion' through the enactment of the Press Ordinance, one pamphlet came to raise the importance of the free press.⁵¹ John Milton published his famous unlicensed pamphlet, *Areopagitica*. The pamphlet marked the beginnings of the free speech concept. Conboy sees Milton's pamphlet as 'the first statement of the liberal view that in a free market of ideas, the good will supplant the bad

⁴⁴ (n 9) 26-27.

⁴⁵ (n 9) 27.

⁴⁶ (n 9) 28.

⁴⁷ Joad Raymond, *The Invention of the Newspaper: English Newsbooks 1641-1649* (OUP 1996) 122.

⁴⁸ (n 9) 28.

⁴⁹ Bob Harris, *Politics and the Rise of the Press: Britain and France 1620-1800* (Routledge 1996) 4.

⁵⁰ (n 9) 30.

⁵¹ (n 9) 32. The Stationers' Company was given the authority by Royal Charter in 1557 for printers to self-regulate their output. This presented an alternative to outright outlawing printed matter – as a solution to impede the flow of unlicensed material. As newsbooks became popular and keeping with demand the authority of the Stationers' Company was in crisis as printing was not undertaken by printers of the company.

and that all intelligent people need is access to the fullest expression of ideas for they themselves to distinguish the former from the latter.⁵²

Thomas Paine, one of the most famous of pamphleteers in England, the United States and France, viewed print as 'essentially a publicly accessible and accountable medium of communication, not a tool under the monopolistic control of government, journalists or printers'.⁵³ Seen as a 'popular agitational' journalist,⁵⁴ 'radical journalist'⁵⁵ and 'father of nineteenth-century radicalism',⁵⁶ Paine is the first author to reach the whole American public with his pamphlet, *Common Sense*⁵⁷ and then the French public with *The Rights of Man*.⁵⁸ The attraction of Paine's writing to the American readers was two-fold – first, its call for independence of the American colonies,⁵⁹ and second, the writing style of the pamphlet which was seen to be written 'in the English of the people, in the language that men use as they go about their daily business.'⁶⁰ The American Declaration of Independence was advanced both by pamphlets, such as Paine's, and newspapers. Paine's own pamphlet was endorsed by newspapers as evidenced by the frequency of newspaper reprints.⁶¹

The Rights of Man was deemed seditious literature by the British authorities and its public sale ceased as a result of a Royal Proclamation in Britain in December 1792. Printers and individuals who helped in its circulation were fined and/or imprisoned. Paine, who was in France and never to return to England, was tried *in absentia* by the King's Bench and was found guilty of high treason. In France, Paine was seen as a champion of human rights inspiring the proclamation of the Republic in 1792.

Pamphlets left a mark on the evolutionary history and partnership between print and journalism. It demonstrates the ability of individuals to harness a technological

⁵² (n 9) 32.

⁵³ Aled Jones, *Powers of the Press: Newspapers, Power and the Public in the Nineteenth Century England* (Scolar Press, 1996) 12.

⁵⁴ Anthony Smith, *The Newspaper: An International History* (Thames and Hudson 1979) 75.

⁵⁵ Jane Chapman, *Comparative Media History – An Introduction: 1789 to the Present* (Polity 2005) 14.

⁵⁶ (n 55), 23.

⁵⁷ William E Woodward, *Tom Paine: America's Godfather 1737-1809* (Secker & Warburg 1946) 66. The first edition was published in January 1776.

⁵⁸ Published in 1792, the pamphlet sold 200 000 copies in 3 years and by 1809, it had sold 1.5 million copies across Europe. See (n 55).

⁵⁹ (n 57) 66.

⁶⁰ (n 57) 68-69, 79. The writing deviated from the tone of 18th century learning and literature heavily laced with quotes of Greek and Latin authors.

⁶¹ (n 1) 81.

development and turn it into a democratic tool through a developmental process of transformation and acceptance from that of a literary genre to one of authoritative socio-political writing. More importantly, it historically pinpoints the beginnings of democratised speech and the earliest forms of citizen journalism.

3. The Changing Role of Media

Not only had the medium that facilitated the media saw a transformation, evolution and change, the role of the media had equally experienced the same. From the role of the media as a disseminator of information and reportage, the media has embraced the function of being advocates of change, a mouth-piece for engaging debate and even dissent. In carrying out the role of critiquing the government, practices such as the use of anonymity and pseudonymity were at one time prevalent.

3.1 The Function of Media - The Fourth Estate

Political journalism or the role of the media as that of the Fourth Estate has seen its passionate beginnings, its failings, its critics and continued transformation. From the late 17th century in Europe, newspapers, apart from reporting events, advocated social and political change. McNair states this element as being essential from then to the present to the role of journalists in a liberal democracy.⁶²

The origin of the phrase “Fourth Estate” is unclear. The first reference was made by historian Thomas Macaulay when referring to the Press gallery in Parliament in an essay in 1828 and later by Thomas Carlyle.⁶³ In 1840, Carlyle made reference to the press as the Fourth Estate in his infamous quote:

[Edmund] Burke said there were Three Estates in Parliament; but in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact...Printing...is equivalent to Democracy...Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority. It matters not what

⁶² Brian McNair, *Journalism and Democracy: An Evaluation of the Political Public Sphere* (Routledge 2000)

⁶².

⁶³ Thomas Carlyle, *On Heroes, Hero Worship and the Heroic in History* ([1841] 1993) 141.

rank he has, what revenues or garnitures: the requisite thing is that he have a tongue which others will listen to; this and nothing more is requisite.⁶⁴

The role of the press as the Fourth Estate is as an informative press crucial in its role as the democratic press. This importance was seen particularly in the US from the 1870s which saw the rise of the informative press, free from political influence to act as a check on government, and political decision-making as a whole, disclosing political activities and engaging debates. In 19th century Britain, McQuail adds that the said 'expression and idea' was adopted by 'serious newspaper press, increasingly conscious of its influence.'⁶⁵ He adds the essential elements of this role as 'autonomy from government and politicians; having a duty to speak the truth, whatever the consequences; and having primary obligations to the public and to readers.'⁶⁶

Several of the writers and editors of newspapers that subscribed to the role of the press as the Fourth Estate expounded on this role as a standard to aspire to. In England, *The Times*, saw itself as the Fourth Estate from the 1830s to the 1850s. *The Times* writer Henry Reeve referred to journalism as 'an estate of the realm; more powerful than any of the other estates'.⁶⁷ John Thaddeus Delane, the editor of the *Times* in 1860 defined this role following the abolition of the paper duties as the business of disclosure;

The first duty of the Press is to obtain the earliest and most correct intelligence of the events of the time, and instantly by disclosing them, to make them the common property of the nation.

In the United States, the vision of the publisher James Gordon Bennett of the New York *Herald* which started its publication in 1835, was 'to make the newspaper press the great organ and pivot of government, society, commerce, finance, religion, and all human civilization.'⁶⁸ In playing this role, taking a balanced approach became essential. *The New York Times* first published in 1851 became one of the earlier professors of this approach in

⁶⁴ *ibid.*

⁶⁵ Denis McQuail, *Media Accountability and Freedom of Publication* (OUP 2003) 52.

⁶⁶ *ibid.*

⁶⁷ Quoted in Boyce; D George Boyce, 'The Fourth Estate: The Reappraisal of a Concept' in George Boyce, James Curran and Pauline Wingate (eds), *Newspaper History: From the 17th Century to the Present Day* (Constable 1978).

⁶⁸ Quoted in (n 1) 155.

separating news from views. Henry Raymond, its founder stated; 'We do not believe that everything in society is either exactly right or exactly wrong; what is good we desire to preserve and improve; what is evil to exterminate and reform.'⁶⁹ This led to the American press breaking alliances with political parties in order to play not only a balanced role but a more objective one. This role was not always favoured as journalists were already being regarded as hacks but were now being seen as 'intruding busybodies'.⁷⁰

From the 19th century and into present time, this view of the press is embedded in liberal theory where democracy and a check on the state are vital. Siebert *et al* wrote that the press:

...serve as an extra legal check on government...to keep officers of the state from abusing or exceeding their authority...to be the watchdog over the workings of democracy, ever vigilant to spot and expose any arbitrary or authoritarian practice... [and] to be completely free from control or domination by those elements it was to guard against.⁷¹

Curran and Seaton added to the liberal theory perspective of the press that whilst press freedom is the right of the publisher to be utilized on behalf of society, its role has to be consistent with the public interest as their actions are regulated by the free market.⁷² This freedom of the press premised on Holmes marketplace theory discussed in Chapter 2, that 'the best test of the truth is the power of the thought to get itself accepted in the competition of the market' was endorsed by the UK Royal Commission on the Press.⁷³

The role of the media as the Fourth Estate is often assumed in recent discussions. McNair comments:

That the actions of government and the state, and the efforts of competing parties and interests to exercise political power, should be underpinned and

⁶⁹ *ibid.*

⁷⁰ Comment made by Anthony Trollope; quoted in (n 1) 163.

⁷¹ Frederick S Siebert, Theodore Peterson, Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility and Soviet Communist Concepts of what the Press Should Be and Do* (University of Illinois Press 1963) 56.

⁷² James Curran and Jean Seaton, *Power Without Responsibility: Broadcasting and the Press in Britain* (6th edn, Routledge 2003) 346-347.

⁷³ Royal Commission on the Press, *Final Report* (HMSO 1977) 109. Discussed in Heading 4, Chapter 2.

legitimized by critical scrutiny and informed debate facilitated by the institutions of the media is a normative assumption uniting the political spectrum from left to right.⁷⁴

The media has not always been mindful in this role – focussing more on entertainment, infotainment and dumbing down of news as increase in competition amongst media owners led to an increased slant towards consumerism, discussed *infra* under Heading 3.3. The media has not always met ‘the standards of information accuracy and objectivity expected of political communication in a liberal democracy.’⁷⁵ This criticism is not a recent one but rather a pervasive one from the time newspapers and pamphlets started gaining popularity. As early as 1833, Lytton raised the question of partisanship and objectivity in a free English press⁷⁶ which lends an explanation to the credibility of and reliance on pamphlets. It had the effect of ‘turning people off citizenship rather than equipping them to fulfil their democratic potential’⁷⁷ and where ‘the political communication process now tends to strain against, rather than with the grain of citizenship’.⁷⁸ Sampson comments that the role in ‘providing the chief context for information and understanding for the public’ has been undermined in recent times by ‘the media’s ability to confuse news with entertainment’.⁷⁹

The sentiments to reinforce the utility of journalism in a functioning democracy continued to be made by publishers of newspapers. The publisher of the Philadelphia Public Ledger, George W. Ochs in a powerful essay in 1906 succinctly observed the importance of journalism:

Journalism has become a very potential, if not a chief, factor in the world's affairs. The advance of civilization may be measured by the dissemination of learning; it received its chief impulse from the art of printing-hence it may be affirmed truthfully that civilization entered upon its latest phase only when printing had attained its latest development, an important manifestation of which is the growth of Journalism. The press within a half century has become the chief medium of enlightenment; it has awakened the masses to full

⁷⁴ (n 62) 1.

⁷⁵ *ibid.*

⁷⁶ Edward Bulwer Lytton, *England and the English* (1833).

⁷⁷ (n 62) 8.

⁷⁸ Jay Blumler and Michael Gurevitch, *Crisis of Public Communication* (Routledge 1995) 203.

⁷⁹ Anthony Sampson, ‘The crisis at the heart of our media’ (1996) 17 (3) *British Journalism Review* 42.

perception of their powers, and has established the fact that an alert and aroused public opinion is irresistible, the mightiest force evolved by modern civilization.⁸⁰

Political journalism, the journalism of the Fourth Estate, has in recent times transformed into political commentary which McNair calls the 'interpretative moment'.⁸¹ He describes this as 'spaces in the public sphere where evaluation of, and opinion about the substance, the style, the policy content or the process of political affairs replaces the straight reportage of new information.'⁸² This type of commentary has come under heavy criticism as it is seen as undermining the function of the media where the commentators use their status as journalists as 'licensed truth-teller' flooding 'the public sphere with speculation and conjecture.'⁸³ The space for this type of commentary proliferated in the mid-1980s as a result of competitiveness of the British newspaper market and demand from readers.⁸⁴ The demand from readers was premised on the assumption of the credibility and authority of the columnist, and on the trust of being guided around and through a political issue.⁸⁵ The legitimizing of this trust rested on the assumption that the construction of political issues by the columnist was based on his/her insider status and independence of thought.⁸⁶

Another issue that has continued to plague the effectiveness of the media to carry this role has been that of media ownership which has led to an increased focus on consumerism. In the late 19th century and the early 20th century, far from being an organ of democracy of the people, the media began to be increasingly monopolized by a few individuals – a concern that continues to re-surface in recent debates. When speaking of these times, Boyce commented that 'the newspaper world appeared more and more to be a mirror of the worst aspects of the capitalist world, with its transformation into a major enterprise, and the consequent emergence of the commercial corporation'.⁸⁷

⁸⁰ George W Ochs, 'Journalism' (July 1906) 28 The Annals of the American Academy of Political and Social Science 38.

⁸¹ (n 62) 61.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ (n 62) 68.

⁸⁵ (n 62) 69.

⁸⁶ (n 62) 69-70.

⁸⁷ (n 67) 36.

The concern in relation to the concentration of media power dominated the critique of media in the 20th century until the present. Increasing public concern in the concentration of the ownership of newspapers began from the late 1960s as a result of the purchase by Rupert Murdoch of *The Sun* and *News of the World*, and in 1981, the purchase of *The Times* including cross-media ownership of broadcasting. Petley calls the deterioration of the Fourth Estate as a result of political partisanship, concentration of ownership and commercialization, from the mid-70s to the end of the Thatcher era, as a period of shame, borrowing the phrase from Gopsill and Neale.⁸⁸ These sentiments continue to echo in the questionable conduct of newspapers today.

3.2 Anonymity and Pseudonymity in Media

For the media to be an effective democratic platform and as a tool to encourage debate, discourse and good governance, reliance on anonymity and pseudonymity has assisted in ensuring free and open discussion, avoiding negative consequences of wrongful retaliation.

In England, anonymity and pseudonymity were prevalent in pamphleteering, seen as an integral and central cultural feature of the activity notwithstanding the fact that it was a time when pressures of publication licensing had not been introduced.⁸⁹ Later, it became a necessity to primarily avoid censorship when licensing laws required publications to bear the names of both author and printer.

Anonymity and pseudonymity of pamphleteers, according to Johann Wigand in 1576, equated them to *Neminists*. According to Wigan:

The *Neminist* is a writer who either alone or with others publishes writings on religious matters in which he conceals his name with the deceitful intention of not being caught...It is characteristics of him to carry on his business in the darkness, in the night, and in secrecy.⁹⁰

Raymond identifies a few other reasons for anonymity and pseudonymity *inter alia* where the author's identity is entirely irrelevant as the text has its own independent authority,

⁸⁸ Julian Petley, 'What Fourth Estate?' in Michael Bailey (ed), *Narrating Media History* (Routledge 2009) 191; Tim Gopsill and Greg Neale, *Journalists: 100 Years of the NUJ* (Profile Books 2007) 251.

⁸⁹ (n 33) 41.

⁹⁰ Quoted in Archer Taylor and Frederic J Mosher, *The Bibliographical History of Anonyma and Pseudonyma* (Chicago University Press 1951) 90.

where the author's identity would undermine the authority of the text, or prejudice its reception or in order to avoid stigma for reasons of gender bias or social status.⁹¹ Expanding on the last reason, anonymity and pseudonymity provided women writers an additional reason - a way to overcome the obstacles they faced in receiving recognition for their work. Pamphlets provided a medium for women authors to write freely under this cloak, to interact through their pamphlets with other pamphleteers without fear of ignominy from male authors and readers at a time when anti-women themed writing was a recurring one.⁹²

The trend of not mentioning the name of the author was not exclusive to pamphlets but was also prevalent in most news medium which included newsbooks and newspapers. The percentage of pamphlets written anonymously increased sharply in the 17th century to more than half of the pamphlets published at a time when newspapers and newsbooks were nearly almost all anonymous.⁹³ In the 17th century, newspapers printed opinionated essays often anonymously in order to avoid prosecution under censorship laws.⁹⁴ In the 19th century, anonymity was an accepted distinctive feature of journalism in England.⁹⁵ The importance of anonymity was tied into the political role played by the press. The following excerpt was published in *The Times* in support of anonymity:

There is not the smallest doubt in any quarter but that Anonymous Writing is the only eligible or effective form of public writing. About that fact there is no question at all. The only question is whether public writing should be allowed to be powerful or not-in other words, whether the action of a free Press should or should not be tolerated.⁹⁶

There was however much debate in 1889 and 1890 on whether which was the best system for the newspaper as an institution - signed or unsigned journalism.⁹⁷ This debate was fuelled by the journalist, Tighe Hopkins, who felt anonymity reduced him to silence.⁹⁸ He felt

⁹¹ (n 31) 64-65.

⁹² (n 31) 297.

⁹³ (n 31) 168-169.

⁹⁴ Christopher Silvester (ed), *The Penguin Book of Columnists* (Viking 1997).

⁹⁵ Marc Da Rosa, 'Henry James, Anonymity, and the Press: Journalistic Modernity and the Decline of the Author' (1997) 43(4) *Modern Fiction Studies* 826, 827.

⁹⁶ Dated 28 October 1861, 6.

⁹⁷ (n 95).

⁹⁸ Tighe Hopkins, Anonymity? (Part 1)(1989) *The New Review* 513.

that it was not the best principle on which to conduct a newspaper.⁹⁹ Hopkins demanded authority over his own authorship as anonymity submerged his identity in the text as being less authoritative and less representative.

In the US, the history of anonymous speech has had an equally entrenched history. Anonymous pamphleteers expressed anti-British sentiments during the colonial times. Anonymity was also endorsed in newspapers with the publication of the *Federalist Papers* written under the collective pseudonym *Publius* written by Alexander Hamilton, John Jay and James Madison. Essays and pamphlets published under pseudonyms were influential in shaping public opinion. Pre-revolutionary essays on free speech and liberty such as *Cato's Letters* and revolutionary pamphlets by *Junius* were famously written under pseudonyms. Paine's *Common Sense* when first published was signed as written by "An Englishman".¹⁰⁰

In the US, the role of anonymity in political speech continued in the 20th century. One of the most prominent one to appear in 1947 was signed "X" titled *The Sources of Soviet Power* written by George Kennan who was President Truman's high ranking advisor.¹⁰¹

Without anonymity and pseudonymity, pamphlets would not have developed as a platform or vehicle for opinion. However, the loss of popularity of anonymity and pseudonymity and the gain of the practice of authorship by signature emerged in the second half of the 19th century when periodicals started to implement a signature policy.¹⁰² Several reasons were attributed to this practice. Maurer comments that the value of attaching a well-known name increased the public interest because public curiosity demanded names.¹⁰³ He further adds that the policy reflected the attempt by editors and writers to increase the honesty and responsibility of periodical writing and it signified a time when journalism and periodical writing garnered respectability ending the reluctance on the part of authors to reveal their identities.¹⁰⁴

⁹⁹ *ibid* 515.

¹⁰⁰ Note, 'Death of Publius: Toward a World Without Anonymous Speech' (2001) 17 *Journal of Law & Politics* 591-592.

¹⁰¹ *ibid* 592.

¹⁰² *Fortnightly Review*, *Macmillan's Magazine*, *Contemporary Review* and *Nineteenth Century* were several of the periodicals that implemented such a policy.

¹⁰³ Oscar Maurer Jr, 'Anonymity vs. Signature in Victorian Reviewing' (June 1948) 27 *Studies in English* 1, 10-11.

¹⁰⁴ *ibid*.

Writers such as Liddle are not convinced by Maurer's reasoning.¹⁰⁵ Liddle considers the state of British journalism when press customs and practices came under scrutiny in the 1850s at a time when the political power of newspapers, such as that of *The Times*, helped shape public opinion and when stamp taxes were removed. From 1855 and onwards, a landmark year when the Stamp Act was repealed in Britain, saw the expansion of the newspaper, the visibility of the increasingly established political press and saw the newspaper becoming more affordable to the working class. The new trustworthiness and increased confidence of the newspapers in their established role, power and reputation, no longer called for the anonymity of its writers. Whilst the shield of anonymity was seen as no longer needed, this trend perhaps may not have been emulated in pamphlets where the pamphlet writer may not have the shield of being protected by a business and is more susceptible to direct legal attacks.

3.3 The Changing Role of Journalism

The discussion of the quality of journalism has been central to the role of journalism in the political and moral life of people and appears as a constant theme for discussion and review when articulating the role of the media. In 1916, Yarros wrote of the state of American journalism:

The truth is, not many of our newspapers answer the reasonable requirements of the intelligent and decent elements of the community.'¹⁰⁶

He goes on to comment on the lack of standard in reporting political, civic, industrial and social news, excessive sensationalism, and the indifference to the questions that really mattered to society.

Interestingly, similar observations have been made of journalism in the UK but only in more recent times. McNair speaks of the 'dumbing down and the rise of infotainment' in that the 'pursuit of profit has replaced the serving of the public interest as the driving force of journalism.'¹⁰⁷ McNair was probably speaking of the increased circulation and popularity of

¹⁰⁵ Dallas Liddle, 'Salesmen, Sportsmen, Mentors: Anonymity and Mid-Victorian Theories of Journalism' (Autumn 1997) 41(1) *Victorian Studies* 31,36.

¹⁰⁶ Victor S Yarros, 'A Neglected Opportunity and Duty in Journalism' (Sept 1916) 22(2) *The American Journal of Sociology* 203.

¹⁰⁷ Brian McNair, *Journalism and Democracy* (Routledge 2000) 3-4.

the “gutter press” or tabloids and not perhaps the broadsheets. It appears therefore that the question on the role of journalism has to be revisited at intervals of time.

So what is essential in journalism? A suggestion made by Carey is ‘that a critical tradition is indispensable to the operation of democratic institutions, and that journalism criticism, properly conceived, is the criticism of language.’¹⁰⁸ Critique was also seen as part of the democratic process of reporting ‘of going and looking for oneself, of reporting the procedures by which this looking took place, and having the report and procedure subjected to criticism’.¹⁰⁹ Applying the critical tradition to journalism is essential as journalism is seen to be a ‘democratic institution’ in view of the democratic role it plays in reporting the critical aspects of contemporary culture and politics. In executing its role as a critic, journalism must also subject itself to criticism. Carey illuminates that the ‘hunger for experience’ and ‘a desire to dispense with the traditional, epic and heroic’ possessed by the middle class provided the impetus for journalism as a distinguishable human activity.¹¹⁰ There were, he states, two motives. Firstly, a desire to possess a particular kind of knowledge, which is news; and secondly, a desire to expand, through knowledge, the boundaries of political freedom. This led to the struggle to secure a right of expression that was not secured by tradition or common law. Carey comments that part of this struggle by the middle class is to be seen in the larger context as the “long revolution” as suggested by Raymond Williams.¹¹¹ Williams sets the revolution as comprising of three distinct components – a democratic revolution, an economic revolution and a cultural revolution – and the binding force of these ‘revolutions’ is the rise of democracy and the expansion of freedom in cultural, political and economic matters.

According to Carey, the evolution of the role of the press can be seen in three historical stages. It first begins with the role of the press acting as a third voice in amplifying the critical process, but not representing the people. The next stage sees the press playing the role of being the voice of the community and a professional critic at a time when government became increasingly remote from the people throughout the 19th and 20th

¹⁰⁸ James W Carey, ‘Journalism and Criticism: The Case of an Undeveloped Profession’ (April 1974) 36(2) The Review of Politics 227.

¹⁰⁹ (n 108) 233.

¹¹⁰ (n 108) 228.

¹¹¹ Raymond Williams, *The Long Revolution* (Columbia University Press 1961).

century. As Carey comments; 'American politics and culture increasingly became based on the premise that public opinion was to be modelled and shaped within the media.'¹¹² McLuhan adds to this when he said that the press is 'a group of confessional form that provides communal participation. It can "color" events by using them or by not using them at all.'¹¹³ He goes on to add that the press 'yields the inside story of the community in action and interaction when the Press exposes daily communal items, investing it with a complex dimension of human interest.'¹¹⁴ The third change revolves around the whole process of reporting and the role of journalism as a critical aspect of contemporary culture and politics.

Returning to Carey's enumeration of the various stages of the press, in particular the second stage and the 19th century, Briggs and Burke comment that popular journalism did not depend on technology as the newspaper was seen as both a symbol and a medium.¹¹⁵ This can be seen with the growth of the "penny press" in New York which contributed heavily to the popularity of the press. For instance, *the Sun*, started by Benjamin Day in 1833, grew in its circulation to 34000 till 1838 when Day disposed of it. The main theme of the paper centred on information relating to ordinary people. *The New York Herald* started its publication in 1835 by Gordon Bennett whose ambition it was to 'make newspaper press the great organ and pivot of government, society, commerce, finance, religion, and all human civilization.'¹¹⁶ *The New York Times*, founded by Henry Raymond, was reputed to provide balanced news reporting in the 20th century, explicitly separating news and views.¹¹⁷

Briggs and Burke concluded that the newspaper had become a symbol as well as a medium in the early 19th century for knowledge, learning and empowerment and union of the people. The writers added that there was more argument about the press than access to information or improved education.¹¹⁸ Walter Bagehot, the editor of *The Economist*, referred to this age as an "age of discussion". Bagehot was of the opinion that newspapers and periodicals were necessary opinion-forming agencies for making discussion possible.¹¹⁹

¹¹² (n 105) 232, 233.

¹¹³ (n 2) 204.

¹¹⁴ (n 2) 205.

¹¹⁵ (n 1) 154, 192.

¹¹⁶ (n 1) 155.

¹¹⁷ *ibid.*

¹¹⁸ (n 1) 161.

¹¹⁹ *ibid.*

As Lytton¹²⁰ put it, when referring to the impact of two penny newspapers, 'a new majority must be consulted, the sentiments and desires of poorer men than at present must be addressed; and thus a new influence of opinion would be brought to bear on our social relations and our legislative enactment.'

It can be seen that the evolution of media includes not only the medium but also an evolution of the role that media and journalism as a profession played within the medium.

3.4 Evolution of the Media's Role - Symptomatic Relationship to New Media

The role of journalism has evolved alongside the evolution of media and is significantly linked to how new forms of media have emerged.

Stöber explains the emergence of new media. He states that the media is derived from what is a two-stage process of inventing and 'social institutionalizing'. While technical invention merely improves old media, for instance, how the printing press improved writing and how the wireless improved wired telegraphy, but it is the process of social institutionalizing that fundamentally changes the invented media. He elucidates that society 'institutionalizes' inventions 'by discovering new possibilities of communication, it formats how new media functions and adapts new media, it develops new economic models, and last but not least, society accepts new media by creating a new political framework and a new legal order for new media.'¹²¹ Stöber adds that once the emergence of new media is accomplished, then the "diffusion" of newly "institutionalized" media takes place. Stöber bases his proposition on the economist, Joseph Schumpeter's, medium-range theory of invention and innovation. Invention refers to the technological process whereas innovation refers to the economic and social acceptance of new products. Schumpeter's theory does not extend to diffusion - it was Rogers who did this.¹²² Rogers looked at invention as 'the making or discovery of something new'; innovation as the stage where consumers, audiences, other individuals or collectives become familiar with inventions leading to acceptance or refusal by them; and diffusion as when the innovations when accepted spread through society.¹²³ Stöber's take on Schumpeter's and Rogers' theory is that these theories suggest that products (in the case

¹²⁰ (n 73).

¹²¹ (n 13) 485.

¹²² Everett M Rogers, *Diffusion of Innovations* (4th edn, The Free Press 1995).

¹²³ (n 13) 486.

of Stöber's article, the media) remain the same but it is the consumers (in the context of media, the audience) who change their attitudes towards the invention when adopted leading to the emergence of new media. He adds that new media emerge to resolve some deficits in the old media arising from dissatisfaction with older media which leads to looking for solutions. This in turn, leads to identification and discovery of new uses.¹²⁴ It is therefore, not surprising that legal and political debates ensue.

Journalism played an important role in the diffusion process of mainstream media and the traditional medium of newspapers, television and radio. The diffusion of social media can be seen in the role it plays as part of daily lives of its users and readers. For the use of social media as a tool of socio-political conversation demonstrates the change of users' attitude whereby social media platforms are no longer viewed as merely tools for social interaction. They have taken on a more meaningful role. It has moved from a platform of socio-political discussion to this discussion being an alternative to traditional mainstream media. The impetus for this shift has been the deficits of traditional mainstream media, discussed in Chapter 4.

3.5 Public Journalism and Democracy

Journalism's role as a profession as the disseminator of opinion-forming information and news has been inherited by citizens owing to the systemic failures of both the profession and the media particularly in advancing socio-political discussion and contributing to news that shapes public and political agenda. The role of news-shaping and setting public and political agenda subscribes to the belief that the political media is key in the democratic process. McNair talks about the study of democracy as 'a study of how the media report and interpret political events and issues; of how they facilitate the efforts of politicians to persuade their electorates of the correctness of policies and programmes; of how [the media] influence the political process and shape public opinion.'¹²⁵ The shaping of this agenda has seen its lapses and it is during the interval of these lapses that the role of news, journalism, the press and the media in democracy helps in a re-focussing of the more important roles of media. McNair quotes Anthony Sampson who commented that 'a mature democracy depends on having an educated electorate, informed and connected through

¹²⁴ (n 14) 495-500.

¹²⁵ (n 107) 1.

parliament.¹²⁶ It is the media that can help in forming such an electorate. McNair enforces the importance of the media in the democratic process.¹²⁷

It is however not to be taken for granted that this “normative assumption” exists in most countries. In each country, there is a need to evaluate whether the media represents a properly functioning “public sphere” – as Habermas called that communal communicative space in which ‘private people come together as a public’.¹²⁸ Is it the “normative assumption” that McNair puts forward which acts as the standard upon which the Fourth Estate is measured? The whole sum of what is known as the media or the press cannot be measured against this value because not all aspects of journalism play the role of the fourth estate. It appears from the discussions that it should be limited to a particular “type” of journalism that promotes democratic debate and discourse – that part of the function of journalism that supports democracy, improves public life and help to shape public opinion when imparting information to keep the citizen well informed and to return to that idea that journalism assisted in sustaining the notion that people can govern themselves. Kovach and Rosenstiel commented that: ‘Civilization has produced one idea more powerful than any other – the notion that people can govern themselves. And it has created a largely unarticulated theory of information to sustain that idea, called journalism.’¹²⁹

The decline of the quality of political journalism attracted much commentary. Blumler and Gurevitch identified the decline in the quality of political journalism and the destabilising effects of an over powerful political media as the ‘crisis of public communication’.¹³⁰ Blumler in 1997 went on to state that ‘the political communication process has gone against, rather than with, the grain of citizenship.’¹³¹ In the UK, McNair¹³² expands on this crisis by asserting that journalism has become an ‘alienating, cynicism-inducing, narcosticising force in our political culture, turning people off the idea of citizenship rather than equipping them to

¹²⁶ (n 79) 47.

¹²⁷ (n 125).

¹²⁸ Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Polity Press 1989) 27.

¹²⁹ Bill Kovach and Tom Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (Crown Publishers 2001) 193

¹³⁰ *Supra*, n 78. The recent concerns of Rupert Murdoch’s attempts of the acquisition of the broadcasting company *BSkyB* and the “phone hacking” scandal are illustrative of this point.

¹³¹ Jay G Blumler, ‘Origins of the Crisis of Communication for Citizenship’ (1997) 14(4) *Political Communication* 395- 404.

¹³² (n 107) 8.

fulfil their democratic potential', relating this point to the low rates of electoral participation – not unlike the situation in the US in the late 1980s, discussed *infra* under this heading. He also includes in the 'crisis' the fact that journalists have become too subversive of authority, too demagogic, too powerful and proactive in setting agendas over the heads of elected politicians.¹³³ The media had perhaps disengaged itself from the public sentiments and opinion and was keener on setting its own agenda rather than engaging with the public, reducing the public as observers rather than key players in political and democratic conversation. In the case of the US, Baker adds that the main thrust of the arguments for civic journalism is "the need to respond to the current democratic distemper, the loss of faith in both the press and the political order."¹³⁴ This assertion may be true in the case of Britain and the US but not Malaysia and other legal systems where the media is highly restricted and regulated or censored. However, he acknowledges trends in political journalism as having acquired the character of a review medium, more analytical and interpretive, and less substantive and more speculative, in comparison to how it was in the past.¹³⁵

In the US, in the late 1980s and the early 1990s, after the 1988 US Presidential elections, a school of public journalism emerged advocating the role of the journalist in a democracy as a promoter of reasonable and informed dialogue among citizens, discussed in Heading 3.2 in Chapter 2. Public journalism or civic journalism, has been referred to as 'the best organized social movement inside journalism in the history of the American press'¹³⁶ and as an alternative to the existing journalistic orthodoxy that existed at that time.¹³⁷ The alternative it provided was a different type of journalism that was citizen-engaged and immersed in the lives of the community through methods such as news selection by the public and dialogue about issues that mattered to the community. It vocalized much of the call of media critics such as John Dewey who as early as in the 1920s felt newspapers were vehicles for public

¹³³ (n 107).

¹³⁴ C Edwin Baker, 'The Media that Citizens Need' (Dec 1998) 147 (2) University of Pennsylvania Law Review 317, 357.

¹³⁵ (n 107) 171.

¹³⁶ Reference made by Michael Schudson, 'What Public Journalism Knows about Journalism but Doesn't Know about 'Public'' in Theodore L Glasser (ed), *The Idea of Public Journalism* (The Guildford Press 1999) 118.

¹³⁷ Arthur Charity, *Doing Public Journalism* (The Guildford Press 1995).

education, debate and structured discussion of public issues and should move away from purely reporting events.¹³⁸

The movement for public journalism rose in the 1990s when many American journalists felt a detachment as public actors and as citizens and a diminishing public image of the press, disengaged from the real concerns of communities.¹³⁹ At that time, many in the profession found neither democracy nor the press in good health.¹⁴⁰ The widespread dissatisfaction of the press and American politics resulted from the aftermath of the 1988 US presidential election where the public felt let down by the failure of the press and media for degrading democratic discourse and the mainstream media's failure in not being able to act as a watchdog press in protecting or representing its interests.¹⁴¹ One example of this was the failure of the press for not exposing the plans to bail out of the banking system resulting from the savings and loan crisis at the time of the campaign.¹⁴²

The core value of this type of journalism is the relationship of journalism to democracy. Rosen, an authority on public journalism commented that public journalism leans towards the treatment of 'citizens as participants, politics as problem solving, and democracy as thoughtful deliberation.'¹⁴³ Advocates of public journalism view journalists as the catalysts of the political theory known as "deliberative democracy" which has the ability of putting the abstract notions of this theory into practice and in turn, political theory can facilitate in clarifying the democratic values promoted by public journalists.¹⁴⁴

The term "deliberative democracy"¹⁴⁵ has many variants in meaning. Parkinson talks about deliberative democracy in its normative sense, being based on two principles. The first is that deliberative democracy insists 'on *reasoning* between people as the guiding political

¹³⁸ John Dewey, *The Public and its Problems* (Henry Holt & Co 1927).

¹³⁹ Harwood Group, *Citizens and Politics: A View from the Main Street America* (Kettering Foundation 1991).

¹⁴⁰ (n 134) 353.

¹⁴¹ James W Carey, 'In Defense of Public Journalism' in Theodore L Glasser (ed), *The Challenge of Public Journalism* (The Guildford Press 1999) 49, 60.

¹⁴² *ibid.*

¹⁴³ Jay Rosen, *Getting the Connections Right: Public Journalism and the Troubles in the Press* (Twentieth Century Foundation 1996) 16.

¹⁴⁴ Albert W Dzur, 'Public Journalism and Deliberative Democracy' (Spring 2002) 34(3) *Polity* 313,314.

¹⁴⁵ Phrase first coined by Joseph Bessette in 1980 and initially referred to the deliberations of elected members of the US congress; J M Bessette, 'Deliberative Democracy: The Majority Principle in Republican Government' in Robert A Goldwin and William A Schambra (eds), *How Democratic is the Constitution?* (American Enterprise Institute for Public Policy Research 1980).

procedure, rather than bargaining between competing interests or the aggregation of private preferences' and secondly, 'the essential political act – the giving, weighing, acceptance, or rejection of reasons – is a *public* act, as opposed to the purely private act of voting.'¹⁴⁶ Democracy is then seen more as a forum for public agreements. And to ensure that public reason dominates public discussion, Parkinson prescribes that 'deliberative democracy requires equality between participants, as do other versions of democracy.'¹⁴⁷ The essence of equality comes in the form of reciprocity of discussions between participants, with the provision of equal speaking time and equal enforcement power.¹⁴⁸ Parkinson emphasized Beetham's¹⁴⁹ prescription that deliberative democracy should also embody the essential democratic principles of responsiveness to reflective public wishes and the political equality of every member of that public. However, there are conditions in place or prerequisites that must be fulfilled that render this type of deliberation as more than 'mere talk' but a 'very particular kind of public talk.'¹⁵⁰ The first is that the participants must be communicatively competent and the second is that the participants are willing to be persuaded. Communicative competence refers to the ability of the participants to understand and critically assess the arguments of others and also make sound arguments of their own.¹⁵¹ On the point of their willingness to be persuaded, this includes the transformation of their argument in favour of a better one. These conditions appear to undermine the ethos of deliberative democracy that hinges on political equality of the public as they create impediments for the certain sections of society who may not be communicatively competent from participating.

Classically, deliberative democracy is seen by writers such as Dryzek as an account of political legitimacy in that 'outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question'.¹⁵² Deliberation with every interested party or person is impossible with the

¹⁴⁶ John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (OUP 2006) 3.

¹⁴⁷ *ibid.*

¹⁴⁸ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press of Harvard University Press 1996); *Why Deliberative Democracy?* (Princeton University Press 2004).

¹⁴⁹ (n 146); David Beetham, *Defining and Measuring Democracy* (SAGE 1994).

¹⁵⁰ (n 146) 4.

¹⁵¹ *ibid.*

¹⁵² John Dryzek, 'Legitimacy and Economy in Deliberative Democracy', (2001) 29(5) *Political Theory* 651.

conditions prescribed above and it is this that has come to be known as deliberative democracy's scale problem as it appears that only "micro" deliberative processes can function properly. But Parkinson suggests that the scale problem can be overcome in "macro" forms. He states;

One version of this conceives of deliberation as conversations carried on across time and space, the threads of which are picked up by people at different times, in different places, and with different interlocutors. At any one moment, people will be engaged in many such threads which change and interact over time. Thus the conversation threads are said to have, to some extent, a life of their own; they are subjectless, decentred. Rationality, on this view, is not necessarily a feature of each individual conversation, because each has only a part of the picture. Rationality is a feature of all the discourses on a topic to the extent that such conversations are openly accessible to communicatively competent publics. It is democratic to the extent that government action is determined by the provisional outcome of the contestation of discourses, discourses which are controlled by communicatively competent people in decentred, flat-structured networks.¹⁵³

Part of the systems that could act as these "macro" forms, for Parkinson, included the media that allowed people to be aware of "micro" forms of deliberative democracy such as debates in Parliament or the outcome of a deliberation by a jury in a trial. However, he goes on to expound that media coverage of deliberative moments is often one-way where the arguments within the micro-deliberative forum is relayed to others but they have no opportunity to relay back their arguments into the said forum.¹⁵⁴

There are clearly limitations on the role of the media being part of the deliberative democracy facilitator. In addition, not all stories are delivered into the public sphere. The reasons for this is the physical limitation on the number of stories that can be covered, whether the story has news values, whether it will be of interest to the wider target audience, or whether the story carries an element of competitiveness where various media

¹⁵³ (n 146) 6.

¹⁵⁴ (n 146) 156.

organizations are rushing to report it.¹⁵⁵ In spite of the challenges in making the media the perfect “macro” forum, the role that public journalism played and continues to play is not to be discounted.

In refocusing their role in contemporary democracy, public journalists employed a three prong reporting practice - by advocating public listening in newsgathering, producing purposeful news, and encouraging public debate.¹⁵⁶

“Public listening” meant news had to reflect the interest of the citizens, finding out concerns in a community where public journalists reported on what they thought a citizen desiring to be engaged in public affairs would need. Dzur states that public journalists saw ‘their readers through a normative model of the active citizen who, under the burdens of daily life, has become passive.’ He referred to Arthur Charity’s exposition of this model:

Public journalism doesn’t only aim to treat readers as citizens, it assumes that readers want to *be* citizens. By and large they’re sufficiently serious about making their cities, states, and country work better that they would hammer out a smart agenda, ask experts and candidates smart questions, and strive for a smart set of solutions, *if* only they had the time, money, access, and professional expertise of journalists.¹⁵⁷

“Purposeful news” deals with reporting on long term policy issues including civic information in allowing people to get involved in public debate. Public journalism seeks participation.¹⁵⁸ It also includes providing the public with a “place” to convene and deliberate on public affairs. According to Dzur, public journalists do this in two ways – the first by making the newspaper a “virtual forum” for people to express and debate problems, and the second, a catalyst or moderator of actual community forums by soliciting answers to voter-generated questions from political candidates and relaying these answers to the public.¹⁵⁹ News then is jointly created by journalists and readers from what is termed as a “mutually defined relationship”. Further, interest on the part of the people as readers pivots

¹⁵⁵ (n 146) 106, 107.

¹⁵⁶ (n 144) 315-319.

¹⁵⁷ (n 143) 19.

¹⁵⁸ (n 135) 357.

¹⁵⁹ (n 144) 317; Tanni Haas, *The Pursuit of Public Journalism: Theory, Practice, and Criticism* (Routledge 2007) 3, 4.

on the participatory element, through the creation of a level playing field of political activity and deliberation capable of participation by elites and non-elites alike. Rosen put it simply; 'People have to participate, so that they'll want and need to become informed.'

Could a drawback in public/civic journalism be the concern that it "crosses the line" in reporting public debates? Baker states with confidence that it champions participation, involves activism but does not "cross the line" in being partisan to the public.¹⁶⁰ Relying on Rosen,¹⁶¹ Baker clarifies his stand by stating that:

Even as civic journalism's proponents expose absurdities in the traditional notions of value-neutral objectivity, they continue to proclaim abstention from partisanship except for a partisan commitment to democracy and other broadly shared values.

Public journalists assert in their claim that they 'function as 'fair-minded' participants in community life whose participation focuses on non-partisan processes and procedures.'¹⁶²

Another drawback that can be perceived from these methods is that in order for public journalism to take place, it must involve a proactive decision on the part of media entities and the journalists to embark on these initiatives as part of public journalism. Unfortunately, public journalism received much criticism for draining newsroom resources, being a marketing ploy and bordering on propaganda.¹⁶³ Public journalism may not have worked effectively at that point of its application as it may have been short of facilitating platforms that exist today – enabled by Web 2.0, discussed in Heading 4.2 *infra* and Chapter 4.

¹⁶⁰ (n 134) 357.

¹⁶¹ (n 143) 70, 72-73.

¹⁶² Theodore L Glasser and Stephanie Craft, 'Public Journalism and the Prospects for Press Accountability' excerpted (1996) 11(3) *Journal of Mass Media Ethics* 152, 153.

¹⁶³ Jack Rosenberry and Burton St John III, 'Introduction: Public Journalism Values in an Age of Media Fragmentation' in Jack Rosenberry and Burton St John III (eds), *Public Journalism 2.0: The Promise and Reality of a Citizen-Engaged Press*, 4

reducing news to a media spectacle.¹⁷⁰ News reporting in this environment raises issues of accuracy and authenticity.¹⁷¹

4.1 Online Journalism

Online journalism is journalism practice that uses the Internet as a medium. This could be the only medium utilized or it could be complementary to traditional print media. This is where, for instance, newspapers may have print versions as well as online versions. The online versions are seen as more dynamic as these can be constantly updated around-the-clock, with the ability to relay the story in multimedia using text, video and photo components, resourced from divergent sources providing not just facts but also opinion and commentary and providing a platform for UGC. Whilst the medium has changed, the values and characteristics of professional journalists did not dilute as a result.

One of the earlier studies on online journalism was undertaken by Deuse and Paulussen¹⁷² using web-based surveys of professional online journalists of news sites which were websites of print and broadcast media as well as purely online news sites conducted between 1999 and 2001 in Holland and Flanders. It covered a wide range of characteristics of online journalists, professional and organizational issues, daily practices and editorial skills.¹⁷³ The conclusion arrived at was that professional online journalists showed a professional hallmark in that there was “no lack of professional experience.”¹⁷⁴ They summarized their findings by suggesting that online journalists were technology-driven, audience-oriented and service-minded. The value-added element as a result of being technology driven is speed and immediacy, interactivity, hypertext and multimedia.¹⁷⁵ These findings were made prior to the use of social media platforms and a similar survey conducted today would find an additional result - that of interconnectivity between media such as online news with news programmes and journalists linking their reporting to their social media platforms.

¹⁷⁰ (n 164) 137.

¹⁷¹ (n 164) 144; Joann Byrd, ‘Online Journalism Ethics: A New Frontier’, (Nov 1996) *The American Editor*, The American Society of Newspaper Editors, 6.

¹⁷² (n 167) 238.

¹⁷³ *ibid.*

¹⁷⁴ (n 167) 240.

¹⁷⁵ (n 167) 242.

The study also demonstrated how online journalism strongly carried an audience-oriented element enabled by the interactivity element enabled by the technology. The interactivity takes place between the journalist and the reader as well as between the readers themselves with a strong majority of the respondents saying that interactivity is important.¹⁷⁶ Further, the provision of platforms for discussion was seen as an important daily practice of online journalists. This interactivity became part of the 'process of empowering users with additional control over the sequence in which information is presented to them.'¹⁷⁷ The participants were aware of the shift of control from the news producers towards the news consumers.¹⁷⁸

4.2 Participatory Journalism

As Hall comments, part of the change in the medium has merely led to an expansion of the "constituency of journalism". This constituency includes activities involving news-gathering, analysis and reportage, which is now extending beyond news to include dialogues with readers who can learn from each other and engage in the debate arising from the story covered by the news article. This is where the readers are increasingly taking the role of being story-tellers transferring the role of gatekeeper from the journalist to the reader who controls and decides what is to be placed online.¹⁷⁹ In respect of involving readers, journalism is embracing a form of participatory journalism that is more direct which is facilitated by the various technological platforms available that can be integrated on news sites. The last observation by Hall on the transfer of the role of gatekeeper may need some qualification. Whilst it may be accurate to state that readers may act as gatekeepers, this can only happen if there are no mediators involved in the delivery of the story - for instance in private blogs. However, in an environment where news sites provide the forums for participation for readers, the role of gatekeeping is very much in the hands of the editors who act as moderators of these sites.

¹⁷⁶ *ibid* 242.

¹⁷⁷ Elliot King, 'Redefining Relationships. Interactivity between News Producers and Consumers'(1998) 4(4) *Convergence* 26, 30.

¹⁷⁸ (n 176).

¹⁷⁹ (n 164) 4,5.

It is fair to say that participation of readers in news activities does complicate the process of content and delivery. On this point, Hall comments:

Particularly important is the problem of how a participatory news affects the public sphere and politics and how journalists contribute to those discourses. The democratizing tendencies of the Net, and we should by no means accept these as givens, seem to make possible a news which becomes heteroglossia accommodating interventions from many different kinds of readers, journalists and sources.¹⁸⁰

As we continue to recognise the technological possibilities of the Internet as outstanding and if journalism has indeed entered a new “medium cycle”, distinct practices must be in place.¹⁸¹ The media is not only dealing with the technology and the engagement of the reader, it also now has to deal with an “internationalisation” factor. Chalaby¹⁸² embraces this new “medium cycle”:

Digitalization and globalization weaken public broadcasters; the Internet multiplies content providers; new media allow new sources to communicate directly with their audiences; entertainment precedes journalism; news is changing, and finally, leading journalistic organizations are integrated into transnational entertainment corporations which today dominate media markets.

One key observation of participatory journalism is the blurring of the line that separates professional journalists from their audience and this could be owing to the fact that it involves the participation of the reader in news production that is put out to other readers.¹⁸³ This can be done in the form of UGC on websites, creating space such as forums for citizen journalists, who are essentially the readers. A very basic form this can take is where readers are given the opportunity to provide comments on news articles. Some of

¹⁸⁰ (n 164) 6.

¹⁸¹ Helena Sousa, ‘Information technologies, Social Change and the Future: The Case of Online Journalism in Portugal’, (2006) 21 *European Journal of Communication* 373,377.

¹⁸² Jean Chalaby, ‘Journalism in History: From the Public Press to the Digital Age’ (2000), paper presented at the CMC Symposium, Bornholm, accessed at <www.cmc.ruc.dk/aktuelt/2000/symp/chalaby-paper.html> accessed 7 January 2012; quoted in *supra*, n 177, 379.

¹⁸³ D Domingo, T Quandt, A Heinonen, S Paulussen, J B Singer, M Vujnovic, ‘Participatory Journalism Practices in the Media and Beyond: An international comparative study of initiatives in online newspapers’(2008) 2(3) *Journalism Practice* 326, 326.

these forums can also be used as material for editorial pieces such as *CNN's i-Report* or *Al Jazeera's Listening Post*. This type of journalism is often distinguished from professional journalism where journalism is conventionally perceived to be attached to some form of institutionalized form of media. Not uncommon is the use of the word "gatekeeper" in identifying journalists as the ones who decide the information the public needs to know.¹⁸⁴ The gatekeeping element is maintained on the forums which allow readers to participate. The difference between the readers' comments and the news presented by the professional journalists is the "professional" element - the so called routines and conventions that aim to guarantee the 'quality and neutrality of institutional journalism'¹⁸⁵ which do not bind the reader. The participatory forums for readers by online news media are subject to control, moderation or sub-editing, or in other words editorial contravention.¹⁸⁶ The reason for this can be seen in a study on participatory journalism forums wherein the findings shows 'mistrust among traditional editors of a genre that threatens to undermine what they consider core values'.¹⁸⁷ And these "values" are editorial content and journalists' objectivity and fairness.¹⁸⁸

In a study of forums for citizen journalists made available on mainstream media online sites, distinctions could be made from site to site on the amount of spaces available for UGC, the format adopted, and the differing level of moderation of UGC.¹⁸⁹ In Thurman's study, one of the main concerns on UGC aired by the editors interviewed commented on how non-professionally produced content challenged journalism's professional norms with particular concerns expressed over the news value of UGC.¹⁹⁰ However, heavy consideration must be given to the conclusions made by Thurman. He states that 'self-published current affairs journalism and news publication' premised on UGC are starting to play as alternatives to established news providers.¹⁹¹ He adds that although some space has been given by

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

¹⁸⁶ (n 183) 143-144.

¹⁸⁷ (n 183) 151.

¹⁸⁸ *ibid.*

¹⁸⁹ Neil Thurman, 'Forums for citizen journalists? Adoption of user generated content initiatives by online news media', (2008) 10(1) *New Media & Society*, p 139.

¹⁹⁰ *ibid* 144.

¹⁹¹ (n 189) 153.

mainstream media for UGC, it is not as a 'direct response to grassroots citizen journalism activities.'¹⁹²

Online journalism has created another by-product, that of global journalism, where news sites are accessible from any part of the world where there is Internet access. The reader is not restricted to a locality or a nationality in order to participate in the debate, forum, discussion or discourse. News sites carrying stories often allow readers to post comments and it only takes a quick read of the origins of these comments to get an informed opinion of how "mass" the mass media has become. In this global environment facilitated by a new medium, where news sites are competing to be the leading provider of news to the global reader, traditional values of journalism have to be reiterated and reemphasized – values such as objectivity, impartiality, accountability, balance, fairness and trustworthiness, as noted by Hall, seem to take on a universal context.

5. Concluding Remarks

McNair commented¹⁹³ that journalistic text is a product of a variety of forces specific to a particular society at a particular time. Whether the changes in the media are social or cultural, or political or psychological, these changes have a profound impact on citizens. Whatever the forces at play, the evolution of the media has courted controversy, debate and a variety of responses. Just as printing caused a stir amongst religious men when their control over the Scriptures diminished through the printing and distribution of books, the same can be said with the advent of newspapers when governments felt threatened with the flow of information, opinion, commentary and debate. The threat posed by the Internet and the emergence of the various platforms that facilitate citizen journalism appear equally as a threat to governments and institutions of the media, and to public interest and the sanctity of free speech and expression. This is certainly not an unexpected development. Where printing became the agent of change, the evolution of the medium of the media at present in the way of the Internet and social media platforms are similarly agents of change.

As the medium has evolved, so has the nature of the message. Within the medium, the message has evolved. This is evidenced in the use of the Internet's various abilities evolving

¹⁹² (n 189) 153.

¹⁹³ (n 11).

from a tool that facilitates dissemination of news to engaging socio-political debate. If in the 1950s, the mass media in particular newspapers and television caused the “communication revolution”, then a new type of communication revolution is taking shape in the form of citizen journalism facilitated by the Internet.

The similarities between the earliest form of citizen journalism in the writing, publishing and distribution and certainly the popularity of pamphlets and citizen journalism on the Internet are evidently pervasive. Whilst the development and proliferation of speech by citizen journalists on the Internet may have been amplified as a result of the accessible technology, the proliferation is no different from when pamphlets developed as the non-mainstream alternative to newspapers - the difference being that the mass distribution of print materials in the form of newspapers was as a result of private ownership of the printing press and therefore limited in availability. Similarly, the developmental process of the nature of the speech on pamphlets also evolved from being of a literary nature to political speech. In the same sense, the nature of the speech on platforms used by citizen journalism on the Internet evolved from being a place to have lifestyle and social conversations to socio-political discussions. The ability of individuals to respond to writings of others whether in agreement or as a critique took place with pamphlets and newspapers, and presently, this ability is made even more effective in the way of online participatory news sites and social media platforms. If the thirst for news and information or comment or opinion was fulfilled by pamphlets, the penny press, radio or television - the Internet and its tools continue to quench this ever-increasing need.

If journalism faced adversity as being an intrusive activity and relied on anonymity and pseudonymity to be more effective, citizen journalists are seen in the same light attracting similar criticism. Hence, the need for anonymity and pseudonymity is fathomable. In certain cultures and states, the right to free speech and expression of certain groups of people, for example, women or advocates of democracy or freedoms, is curtailed. In the past, these attitudes were once prevalent in the West, when individuals resorted to writing pamphlets and at present, amongst social media platforms, blogs are a medium of choice. Anonymity in political writings is not a novelty and continues to be a catalyst for the publications of free and open commentary, opinion or debate on the Internet. Therefore, the discussion on this

issue is re-visited in legal terms, in Chapter 6, in view of numerous legal attempts to disclose the identity of individuals on the Internet.

In terms of how history has recorded the reaction of governments in curtailing the shaping of public opinion and the radicalisation of the citizenry, legislative initiatives such as increasing the price of newspapers through the imposition of stamp duty albeit rudimentary were means of limiting the impact of the message. In terms of the use of the law in present times, the development of fundamental human rights, in particular in the context of the media, freedom of speech and expression, is a catalyst to the growth and expansion of the role of media and conversely, the lack of development, or even the absence, of such freedom impedes the role of the media that serves the citizenry.¹⁹⁴

As the medium evolved, so did the message within the mediums. Pamphlets covered a range of subject matter but desire for news saw an increase in political commentary and strong editorial perspective. The same was the case with newsbooks, newspapers and in the context of the Internet the same can be observed in the popularity of socio-political blogs and the use of SNSs to engage in debate of contemporary issues.

If the aim of public journalism is for journalism to be centred on 'citizen participation in news selection and encouraging dialogue about issues',¹⁹⁵ participatory journalism by citizens on UGC forums on online news websites strengthens this aim. When public journalism was seen to be at a crossroads owing to a decline in its popularity as a consequence of draining newsroom resources and its negative image as a marketing ploy,¹⁹⁶ the potential and ease of the Internet and Web 2.0 making such forums popular introduced citizen journalists. As Burton and St John put it – 'Could they perhaps be the inheritors of the "democratisizing" influences promulgated by public journalism and take up where it left off?'¹⁹⁷ Making journalists and citizens "partners" in setting the news agenda, interactive online websites puts into action public journalism as it offers 'a practical and efficient way

¹⁹⁴ Discussed in Chapter 5.

¹⁹⁵ Jack Rosenberry and Burton St John III (eds), *Public Journalism 2.0: The Promise and Reality of a Citizen-Engaged Press*, 3.

¹⁹⁶ Burton St John, 'Newspapers' struggles with civic engagement: The U.S. press and the rejection of public journalism as propagandistic' (2007) 10 *The Communication Review* 249-270.

¹⁹⁷ (n 195).

for interactive communication to occur among citizens of a community grappling with a public issue.¹⁹⁸

The role of the media was to facilitate informed critical scrutiny and debate in line with its position as the Fourth Estate,¹⁹⁹ the Internet in a similar role is seen as the Fifth Estate.²⁰⁰ As discussed in Heading 3.3 *supra*, the evolution of the media included not only the evolution of the medium but also the evolution of the message – the latter being closely linked to the changing and developing role journalism plays within the media. The focus of the message evolved into serving the public interest with the role of journalism being that of carrying a function of civic or public journalism. The failure of mainstream media in the US, for example, to function as a tool of public journalism is demonstrative of the conclusion that the degree to which the message is effectively disseminated is dependent on how effective the medium is. If public journalism failed as a result of an ineffective or unsuitable medium in relaying the message, then the evolution of the Internet to the Web 2.0 stage may see the medium evolving to enable the message to be relayed.

Hence, the next phase of citizen-engaged speech saw the emergence of the individual as the citizen journalist as a result of interaction between technology and social change. One could say that this was as a result of the democratisation factor of Web 2.0 platforms that allowed citizen journalists to create a new media ecology parallel to that of traditional mainstream media. In the true spirit of deliberative democracy, these platforms can be seen to provide a method to respond to deliberative moments of our times with an opportunity to relay back arguments. Although these platforms create a fragmented landscape, as discussed in the next chapter, where sources of information generated are varied as are the topics of discussion, what is clear is that our daily source of information and news is no longer restricted to the flipping of pages of newspapers whether real or online. To articulate this change is to negate A J Liebling's memorable quote that that 'freedom of the press is guaranteed only to those who own one'.

¹⁹⁸ (n 195) 4.

¹⁹⁹ (n 62).

²⁰⁰ Discussed in Chapter 4.

However, the media's role has not always been executed with credibility. Systemic failings of the mainstream media has been questioned at an early stage of its developmental period,²⁰¹ and continues to be questioned in recent times and today, has fuelled the recent critique of mainstream media as that which is straining against rather than with the grain of citizenship. Problems of consumerism and infotainment eroding this role are central to the debate in the UK, particularly the loss of credibility arising from *The News of the World* phone hacking scandal and the related controversies in the lead up of the establishment of the Leveson Inquiry in 2011.

The liberal theory makes it apparent that the democratic role of the media can only be carried out if the media is independent - independent from government, heavy handed legal regulation, political party influence and concentration of ownership in the hands of a few. The consumerist practices of media owners have however, at present left no alternative for the government except to question the press. The present UK government has ordered for the Leveson Inquiry²⁰² to look into the culture, practice and ethics of the press following the phone hacking scandal of *The News of the World* and the Murdoch media empire.

Where the press has attained recognition over a period of historical stages as amplifying the voice of the people, then the voice of the community and finally critical journalism,²⁰³ the legal recognition of rights and responsibilities followed (discussed in Chapter 5). If this historical evolution is to be taken a step further to the present context, as the press obtained its recognition upon the recognition of its important as part of political and social commentary, the same can be said with citizen journalism on the Internet. If its role has the potential to contribute to society in all the roles and functions as the press carries out, the credibility of citizen journalism on the Internet similarly rests on the legal recognition that can be accorded to it. Hence, in the next chapter, discussion of the phenomenon of citizen journalism on the Internet will contextualise and appreciate its role and value to socio-political debate and discussion.

²⁰¹ (n 76).

²⁰² Leveson Inquiry: The culture, practices and ethics of the press <<http://www.levesoninquiry.org.uk/>> accessed 8 July 2013.

²⁰³ (n 108), discussed in Heading 3.3.

Chapter 4

Citizen Journalism and New Media

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1. Introduction – The Continued Evolution: From Traditional to the Alternative

In the previous chapter, the evolution of the traditional media saw it adopt new technology to disseminate information and news. The evolution also evidenced the traditional media embracing a new voice, the voice of the individual, in participating in the discourse and

debate of current news. The empowerment of the individual voice through the Internet as a medium came following the availability and evolution of use of the various platforms to channel that voice. This availability of media platforms led to the ability of individuals to be the producers of media, generating “news” rather than acting as mere consumers as they have done in the past.

A milestone in the evolution of the media is the appearance of new media and in particular, the way in which the Internet facilitates this media, especially through social media platforms. Social media actors are individuals who utilize this type of ICT-propelled media to develop online personalities as a way of self-expression. Web 2.0, the term coined by O'Reilly,¹ represents the second generation of websites which allow users to share content on the Internet using the various platforms to do this. With the evolution of the medium, came the evolution of the message. Blogs, *Twitter*, *Facebook*, *MySpace* and numerous other similar platforms have been referred to interchangeably as the new media or the purveyors of the information revolution and in certain cases, are viewed as a new way of civil disobedience, a ‘cyberdissidentship’, where citizens can magnify their voice to relay an important message, particularly in the socio-political context. This is not to say that these platforms are free from abusive, harmful and nefarious speech.

This chapter seeks to build on the study of the evolution of the media in the preceding chapter. The stage of evolution here is the one which has the ability to enable citizens and readers to present their opinion in something more individually generated such as citizen journalism. The chapter will begin by setting out when citizen journalism on the Internet started attracting global attention and contributing to news. It will encompass the nature and characteristics of citizen journalism in particular highlighting several deficits in mainstream media that contributed to its emergence as a democratic tool and identify the characteristics that differentiate traditional media from citizen journalism. It will describe the technology and communication-driven platforms that enable this type of journalism; and finally, will identify several of the key uncertainties, critique and challenges that new media and citizen journalism faces. By way of a cautionary warning, the chapter contains the

¹ See Tim O'Reilly, ‘What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software’ (*O'Reilly*, 30 September 2005) <<http://oreilly.com/web2/archive/what-is-web-20.html> > accessed 20 January 2012.

use of new words and phrases coined to describe facets of the citizen journalism phenomenon.

The chapter is important as it highlights the development of the phenomenon and demonstrates its potential to contribute to society in all the roles and functions. The discussion places in context the role and value of citizen journalism in socio-political matters of public interest.

2. The Tipping Point When Citizen Journalism Contributed to News

UGC on the various social media platforms did not always contribute to social media activity in socio-political matters of public interest. The “tipping point” narrative sets out the point in time when the contribution of users became significant and meaningful. This is helpful in contextualising the importance of citizen journalism on the Internet as the contributor of news.

It is rather ironical that it was a reputable magazine, a member of the mainstream and traditional media which highlighted the start of the hype around the individual as the new player in the media, considering that much of the critique of citizen journalism on the Internet now comes from the mainstream media in particular traditional journalists. *Time Magazine*’s “Person of the Year” in 2006 was “You” – the so-called “prosumer”.² This signalled to the world a significant recognition that ‘[A]nyone could become a media outlet if they wanted to, and people clearly wanted to.’³ To illustrate the impact of this, reference is made to the “YouTube model” having been cloned in more than 150 million blogs as well as in features found on online versions of mainstream media such as the *iReport* segment on *CNN* which began in August 2006 and replicated by other mainstream media entities such as *Al Jazeera* on its *Listening Post* show. This new media culture represents the public who is no longer a passive consumer of media, but an active participant in the creation of media landscape.⁴

² The word ‘prosumer’ means the digitally productive consumer. Jaap Bloem, Menno van Doorn, Sander Duivestijn, *Me the Media: Rise of the Conversation Society - Past, Present and Future of the Third Media Revolution* (VINT 2009) 8. VINT is the Research Institute of Sogeti, and was founded in 1994.

³ *ibid.*

⁴ Alfred Hermida and Neil Thurman, ‘A Clash of Cultures: The integration of user-generated content within professional journalistic frameworks at British newspapers websites’ (2008) 2(3) *Journalism Practice* 343; referring to comment made by Paul Saffo who was quoted in *Economist*, 2006.

Advocates of “you-media” speak of how the present time indicates the end of a chapter of media history whereby the monopoly and control which was once in the grasp of the media elites such as media corporations, politicians and traditional journalists has passed.⁵ The claim made is that there is a new media power and this time of change is referred to as the “Third Media Revolution” following from ‘the individuation and socialization brought about over the past 400 years by print and electronics.’⁶ It signifies a shift from the elites who control the media in a particular country into the hands of the individual. The explosion of social media not only troubles the traditional media entities but also the State, discussed in Heading 7 in this chapter, *infra*. The concerns of both the traditional media and the State are real owing to the fact that much of the motivation for social media actors is not financial but is for an open democratic conversation. In certain countries, it introduces a degree of pluralism to the media that is accessible to the citizen and takes it a step further, by engaging a citizen-to-citizen interaction.

The tipping point of the emergence and push towards an important element of news-relaying came slightly before the hype of 2006. The term ‘tipping point’⁷ was used by Allan to describe the moment when citizen journalism came to be known as a significant provider of news and the tipping point according to Allan was the Asian Tsunami in the December of 2004. There had been much criticism at this time of professional journalists reporting in conflict zones practising “helicopter journalism”. The term coined by Schecter,⁸ indicates the distance journalists are from the occurrences and happenings on the ground. Allan quotes Schecter who highlights the need for an “inside-out” and bottom up coverage and not just merely ‘reporting from the clouds.’⁹ Allan adds to this by stating that it is an ‘extraordinary contribution made by citizens offering their first-hand reports, digital photographs, camcorder video footage, mobile telephones snapshot of audio clips’¹⁰ that

⁵ (n 2) 9.

⁶ *ibid*.

⁷ Term was borrowed from Malcolm Gladwell, *The Tipping Point: How Little Things Can Make A Big Difference* (Malcolm Gladwell, 2000). Allan refers to the ‘tipping point’ as a term often to characterize the precise instance when a seemingly minor and insignificant change can suddenly generate profound consequence and when the rate of a process increases so dramatically that it creates surprising results; Stuart Allan, *Online News* (OUP 2006) 1.

⁸ Stuart Allan, *Online News* (OUP 2006) 6. Allan refers to Danny Schecter’s reference to ‘helicopter journalism’. See Danny Schecter, ‘Helicopter Journalism’ (*Mediachannel.org*, 5 January 2005).

⁹ *ibid* 7.

¹⁰ *ibid*.

provided reportage of the tsunami. He states that this material, whether carried on individual blogs or carried by news organizations, had a profound influence on audience perception of the tsunami around the world. *The Independent* newspaper commented that it had the impact of resulting in trouncing the coverage made by news television crews.¹¹ Much of the images and video footage was provided by amateurs who happened to be present and as Allan comments, had the presence of mind to record the horrors taking place before their eyes.¹² This led to the using of the term “citizen journalism” appearing in mainstream media. Blogs that were set up to cover the tsunami were receiving unprecedented traffic with an even more unprecedented number of blogs mushrooming as they rapidly become the “eyes and ears” of the disaster.¹³

The emergence of blogs and citizen journalism led to Allan characterizing the ‘qualities of bloggers’ reports as providing a degree of depth and immediacy that mattered.’¹⁴ This was precisely the case with the Haiti earthquake disaster in 2010 when the first news coming out of Haiti was through *Twitter* and blogs. This was seen again during the Arab springtime revolution in 2011 on an unprecedented scale – unprecedented owing to the subject matter of reporting which was different from natural disasters but was instead a part of the agenda to instigate a revolution for democracy. The devastation of the earthquake was seen through *TwitPics* including minute-to-minute updates through SNSs. A viable alternative to “helicopter journalism”, this kind of amateur reporting is seen by Allan as both, authoritative and reliable, in terms of it being unbiased and unfiltered.¹⁵ Critics of amateur reporting who perceive such reporting as often speculative and not factually grounded are not far from identifying the same problems which are prevalent in traditional media practices. “Helicopter journalism” equally tends to result in speculative reporting on the occurrences of events without support of truth and facts.¹⁶

¹¹ *ibid.* Allan refers to *The Independent*, 3 January 2005.

¹² (n 8).

¹³ (n 8) 7-8. Allan refers to *Technocrati.com*, which reported that some 55000 blogs appearing over the first three days, with tens of thousands appearing thereafter.

¹⁴ (n 8) 9.

¹⁵ (n 8) 10.

¹⁶ Recent examples of this includes the speculation that the death of Amy Winehouse in July 2011 was probably a consequence of an overdose of drugs and alcohol and that the shooting in Norway also in July 2011 could be related to Islamic terrorists organizations at a time when the investigation was on-going.

For the people and media sphere of the UK, the experience paralleling that of the Asian Tsunami as a tipping-point was the 7/7 bombing of the London subway on 7 July 2005. Douglas wrote about the democratized media with the public contributing photos and videos, referring to 7/7 as the day UGC came into its own in the UK.¹⁷

In the US, the tipping-point of the emergence and importance of blogs as part of the political national conversation began with the Trent Lott political controversy at a time when blogs were unknown to most Americans. An entry on a blog, spread through the rest of the blogosphere, and was later carried on mainstream media. It led to the resignation of Senator Lott who became the first majority leader in Senate to resign under pressure in 2002. Lessig argued that were it not for blogs continuing to discuss and put out the story of the remarks by Senator Lott on the Internet, his resignation would not have materialized/ensued. He comments that though the story 'disappear[ed] from the mainstream press within forty-eight hours', 'bloggers kept researching the story' until, '[f]inally, the story broke back into the mainstream press.'¹⁸ As for natural disaster coverage in the US, the power of new media came to the fore at the time of Hurricane Katrina in 2005.

The tipping point for Malaysia came with the use of social media, in particular blogs, to organize the BERSIH rally¹⁹ in November 2007 for fair and free elections and the platform for debate and discussions used by citizens and members of the opposition leading up to the 2008 general elections. The blogosphere continues to fuel national conversation and debate.

Lovink commented that the events such as the Asian Tsunami, the 7/7 bombings and Hurricane Katrina in 2005, 'demonstrated the fact that citizens now have an integral role in

¹⁷ Torin Douglas, 'How 7/7 'Democratised' the Media' (*BBC News*, 4 July 2006) <http://news.bbc.co.uk/2/hi/uk_news/5142702.stm> accessed 5 March 2012.

¹⁸ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin 2004). The controversy surrounded Lott's support for Senator Strom Thurmond in a speech Lott made at Thurmond's 100th birthday party in December 2002. In the speech, Lott explicitly mentioned support for Thurmond when Thurmond ran for President of United State in 1948. The support was seen as controversial as Thurmond had based his presidential campaign challenging the civil rights movement and calling for racial segregation.

¹⁹ The BERSIH rally that called for free and fair elections was organized and publicised primarily through the blogosphere.

the production of news.²⁰ Although much of the contribution in these events was limited to how the events unfolded, the experiences of the people affected, the rescue missions and the catastrophic impact as a whole, the contributions themselves did not court controversy, except perhaps in certain circumstances where the visual contributions were graphic. It was perhaps incidents such as the Trent Lott controversy in the US, the BERSIH rally in Malaysia or the video of the Burmese Monk anti-government protests in 2007 that pushed contribution of citizen journalism on the Internet towards the socio-political realm.

From these tipping-points, which on a timeline differ from state to state, the contribution of citizen journalism on the Internet grew not only in numbers and readership but also in value and importance.

3. Characteristics of citizen journalism on the Internet

Clearly, citizen journalists are a breed different from professional journalists. There is therefore a need to set out several features that distinguish the two whilst also being mindful of the similarities. The determination of the legal position of citizen journalists on the Internet pivots on the need to appreciate these characteristics. Whatever the legal position taken, it must not serve to have a chilling effect on the contribution of citizen journalists.

3.1 Citizen generated and citizen empowered

Citizen journalism is characterized by several elements. It is primarily citizen-generated, or the term we have become familiar with is, content that is user-generated, where ordinary people put up information on various platforms. It possesses journalistic values such as news-relaying although not generated by institutionalized or mainstream media entities. The term UGC suggests that the individual is the creator or the source of the information. There is however another layer to this, that is UEC which is content that is not created by the individual user but content that an individual user pushes into the headlines. This too is done on various platforms. One example of this is *NowPublic*, which will be discussed *infra* as well as the “share”²¹ tool that allows linking between platforms. Much of UGC that is seen as part of social media and news that has an impact carries a socio-political theme with

²⁰ Geert Lovink, *Zero Comments: Blogging and Critical Internet Culture* (Routledge 2008) x.

²¹ This tool allows readers to share articles, videos and pictures amongst different social media platforms. See <www.sharethis.com> accessed 20 July 2012.

a public journalism role. These can be evidenced by various lists and ratings of blogs that have emerged on the Internet. One merely has to perform a *google* search for sites that do this.

3.2 Anonymity and Pseudonymity

Naturally one of the features that characterize much of citizen journalism is anonymity. Bloggers or tweeters use pseudonyms for a variety of reasons. These range from non-disclosure of their real identities to avoid identification in order to continue their online activity, to avoid persecution, to protect their privacy or to create a distinct online personality. In certain countries, owing to the cultural context, taking on a persona is essential for the message to be given credibility where there is suppression of speech of a particular section of society or minorities or marginalized communities. For instance, there are women who blog impersonating men on socio-political issues in the Middle East. At first glance, this may appear to mislead readers but the question is this - which is more important - the message or the messenger? Whether anonymity or pseudonymity erodes credibility will be discussed in Chapter 6.

3.3. Controversial

When taking a personal close-up look of citizen journalists, particularly those whose message comes within the socio-political realm, they can be seen as equally relentless in catching the attention of online readers as well as the mainstream media. In an expanding blogosphere, the need to court publicity, not unlike mainstream media, has attracted controversy and debate. For instance, in June 2011, a controversy arose surrounding the revelation that an American studying in Edinburgh was blogging as a Syrian lesbian. Because of its apparent authorship, the blog had received increased readership as well as coverage and increased attention when a comment posted on the blog claimed that the blogger had been arrested. This concern resulted in social media rallying for her release not knowing 'her' true identity and that it was a hoax. It has called into question the authenticity of speech on blogs and tainted the blogosphere.²² The blogosphere reacted by calling it an irresponsible act especially when the persona taken on crossed the line from fact to fiction. The posts up to the point of the false information of the arrests were substantially accurate

²² 'Syria Gay Girl in Damascus blog a hoax by US man' (*BBC News*, 13 June 2011)
<<http://www.bbc.co.uk/news/world-middle-east-13744980>> accessed 27 March 2012.

depicting the struggles of Syrian lesbians. It raised several pertinent legal questions that will be addressed in Chapters 5 and 6 such as responsibility and accountability of citizen journalists who are not bound by the professional code of ethics or conduct.

3.4 The motivation

Citizen journalists are not professional journalists. The two are quite distinct. Professional journalists are often members of journalists' unions and are usually employed or independent contractors. The citizen journalist who writes on socio-political matters is not working for an establishment but often for a cause. The other difference between citizen journalists and journalists working for the mainstream media is that there is less of a self-interest element in reserving the limelight for themselves as bloggers carry stories from other bloggers taking as an example the discussion *infra* on UEC.

3.5 The alternative truth and news

The narrative that originates from citizen journalism on the Internet is "alternative" news-relaying and to some extent this blurs the lines of the producer of the news for readers – whether the producer is a professional journalist or a citizen or amateur journalist. There is an increasing recognition of citizen or amateur journalism, as discussed in Heading 2 *supra*, as having an impact on news intake by the general public.²³ Controversies surrounding socio-political bloggers and tweeters make mainstream news. Citizen journalists using social media platforms, whose commentary is categorised as of a socio-political nature, are often critical of the government or as the case may be the opposition. They offer alternative viewpoints not put forward by mainstream media with the motive of debating issues that affect citizens and their rights. The variance in the issues from country to country which can be potentially socio-political will depend on the current issues in debate politically, the issues affecting society or the issues that are generally taking centre stage in the national conversation.

3.6 Unprecedented insight

There is also an element of social media platforms providing an insight into the work and life of individuals related to the opportunity of doing so under a cloak of anonymity and

²³ In a survey conducted by Microsoft MSN and Windows Live Online Services Business titled 'Blogging Asia: A Windows Live Report' published in November 2006. See <http://advertising.microsoft.com/asia/NewsAndEvents/PressRelease.aspx?Adv_PressReleaseID=296>, or, <<http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/11-28-2006/0004480819&EDATE>> accessed 11 November 2011.

pseudonymity. This has led to this type of media being used to whistleblow on wrongdoings and is most apparent when bloggers blog about their work. Although they may not appear as outright whistleblowers such as disclosing detailed information in the form of documents, there is that element of highlighting shortcomings within the working environment and this will be of importance when the blogger is in the type of business that may attract public interest. For instance bloggers who do social work have a directory, listing blogs written by workers in the field.²⁴ And in the financial sector, blogs seem to attract a lot of attention with extensive directories listing them²⁵ with commentators stating that these blogs have great influence.²⁶ In the UK, the blog of Police Detective Horton as *NightJack* attracted an action in the High Court which resulted in him losing his anonymity, discussed later in this chapter and Chapter 6.

3.7 Engaging citizens - the democratising effect

Citizen journalism on the Internet has morphed into a form of advocacy and digital democracy. One of the strongest characteristics of citizen journalism is its democratizing nature. Many new phrases have found their way into our daily usage when referring to what has been called the third media revolution which has led to sparking a keen interest in citizen media or UGC media. The impact that this has had in Malaysia is phenomenal. The impact of this phenomenon is elevated to a more serious level when such media functions to promote a particular value that may benefit the society whether in a nation, as is the case in Malaysia, or in a global context. This value can be seen as playing a social role, as a new form of expression and a new form of advocacy. In this case the basic functions of media and information and communication technology merge to form a new tool of democratization or a tool that facilitates democratic actions evolving from a tool which merely magnifies and multiplies the spread of news and expression. The fact that the Internet was a tool of democratization was referred to by Dalzell DJ in *ACLU v Reno 1* at a time when the Internet was in its infancy and well before the advent of UGC.²⁷ Dalzell

²⁴ See for example *Social Work Blogs: The Authoritative Social Work Blog Directory* <<http://www.socialworkblogs.info/>> accessed 23 January 2012.

²⁵ See for example All Top Finance Blogs <<http://www.blogcatalog.com/category/finance/>> accessed 21 July 2012.

²⁶ See for example, Karyn McCormack, 'Financial Blogs: The Best of the Bunch' (*Bloomberg Businessweek*, 7 April 2008) <http://www.businessweek.com/investor/content/apr2008/pi2008045_506665.htm> accessed 21 July 2012

²⁷ 929 F Supp 824 US DC Penn (1996), 881.

referred to Internet communication having democratizing effects where 'individual citizens of limited means can speak to a worldwide audience on issues of concern to them...making it the most potent democratizing tool ever devised.'

3.8 The fellowship

One of the emerging characteristics is the solidarity amongst citizen journalists on the Internet nationally or across borders. When the environment for citizen journalists is threatened where, for instance, a political blogger is arrested or when an application for the disclosure of identity of a social media activist is made to the administrator of a social media platform, the rallying voice of readers and social media activists seems to unite against such action. The solidarity amongst citizen journalists has been known to be built nationally, such as Bloggers United in Malaysia, and internationally, for instance the #CN4Iran, short for 'China for Iran' which aimed to build solidarity and support between cyberdissident movements launched by Chinese netizens.

4. Tools of the trade – advocacy by technology

As discussed in Chapter 3, the practical factor popularizing this type of journalism would be the availability and accessibility of the technology. One of the reasons for the growth of citizen journalism is the availability of user-friendly and low-cost online content management tools.²⁸ The range of tools used has increased over a period of time and so have the uses. Current journalistic uses of social media platforms include news reporting of disasters, in conflict zones and court proceedings; political mobilisation in semi-democratic states and to expose government wrongdoings in both liberal and non-liberal states. The tools used are dependent on which one is the most appropriate in the circumstances.

4.1 Blogs

Although there are a variety of tools that can be utilized to carry UGC across the Internet, blogs and videos seemed to have attracted the most attention at the initial stage. Blogs were the first social media tool that made citizen journalism a phenomenon as discussed in Heading 2. The build-up of the hype of social media activity with the individual user as the potential contributor began with the buzzing on the blogosphere.

²⁸ Neil Thurman, 'Forums for citizen journalism? Adoption of user generated content initiative by online news media' (2008) 10(1) *New Media and Society* 139, 140.

To harness and maximize the use of this technology, there is easy accessibility and availability of the “know-how” needed to write an effective blog. One that is constantly updated with newer editions is *Reporters without Border’s Handbook for Bloggers*. The earliest version was made available in 2005 and has been updated in 2009.²⁹ By simply visiting the *Global Voices Online*³⁰ project called ‘*Global Voices Advocacy*’,³¹ a blogger or a potential one can access information on a guide on how to blog ‘for a cause’, how to blog anonymously by using *Wordpress* and *Tor* or the Advocacy 2.0 Guide on ‘Tools for Digital Advocacy’. There are also numerous sources of advice and assistance in the form of ‘do’s and ‘don’ts’ provided to bloggers new to blogging such as choosing the best tool, how to set up and run a blog, code of ethics and conduct, including how to get picked up by search engines, making a blog shine, and even technical ways to get round censorship. All these serve to encourage the use of the blogosphere to be an effective and perhaps even a safe and secure means of transmitting news, stories and opinions.

From the discussion thus far, it is evident that one of the primary contributors to the popularity of this new media has been the emergence of blogs, and in particular socio-political blogs. Blogs of this nature, although small in number, seem to attract the greatest readership and following. It is an accepted fact that there are millions of blogs around with the figure standing at approximately 132 *tumblr* blogs³² and 69 million *wordpress* blogs³³ in 2013 with many more created on a daily basis. Although blogs cover a range of subject matter with several in other genres having an equally large following or readership, socio-political bloggers, being a contributor to news, debate and discourse of matters in the socio-political realm and public interest, act as an alternative to mainstream media, as an activist and as a mediator of public opinion. How do these blogs appear more prominently in attracting readership and that appear to carry a degree of credibility? Hewitt points out that the key is speed in the race ‘to gain mindspace, to be part of the blogosphere reader’s habit’. ³⁴ He also speaks of the importance of trust as bloggers are the surrogates that

²⁹ Handbook for Bloggers and Cyber Dissidents, *Reporters without Borders* <http://en.rsf.org/IMG/pdf/guide_gb_md-2.pdf> accessed 21 July 2012.

³⁰ *Global Voices* <<http://www.globalvoicesonline.org>> accessed 21 July 2012.

³¹ *Global Voices Advocacy* <<http://advocacy.globalvoicesonline.org>> accessed 21 July 2012.

³² See <www.tumblr.com>.

³³ See <www.wordpress.com>.

³⁴ Hugh Hewitt, *Blog: Understanding the Information Revolution That’s Changing Your World* (Nelson Book 2005) p xx.

readers trust.³⁵ Readers have become discerning in what they read, not unlike old media entities, looking at various lists that rank blogs according to popularity and subject matter. A way in which readership can be drawn to a particular blog is when excerpts from famous and credible blogs are picked up by other bloggers and spread across the blogosphere. Hewitt speaks of “blog swarms” which are formed when ‘blogs pick up a theme or begin to pursue a story’ and this brews an ‘opinion storm’ that breaks impacting the general public’s understanding of the subject matter of the ‘blog swarm’.³⁶

Although other forms of platforms have emerged, blogs continue to be popular as *the* platform for citizen journalists on the Internet.

4.2 Organisational Support

Organisational support of citizen journalists comprises of news websites that are dedicated to stories from individuals, providing know-how as discussed in Heading 4.1 *supra* and recognition.

News websites such *IndyMedia*³⁷ and *OhmyNews*³⁸ provide platforms for individuals to upload stories, photographs and videos – launched in 1999 and 2000 respectively. The former is based in Seattle, US and the latter in South Korea. The hybrid model adopted by both sites is interesting as it involves permanent staff comprising of journalists who edit and ensure integrity of the information through fact-finding of stories posted by citizen journalists. Oh Yeon Ho, founder of *OhmyNews* described the website as having the merits of a blog and a newspaper.³⁹ These sites support citizen journalists in getting their news across effectively by conducting community reporting workshops as in the case of *IndyMedia*⁴⁰ and editors of *OhmyNews* interact with their citizen journalists on online forums and discussions.⁴¹

³⁵ *ibid* xxiii.

³⁶ *ibid* 1.

³⁷ *Independent Media Center* <<http://www.indymedia.org/en/index.shtml>> accessed 21 July 2012.

³⁸ *ohmynews* <<http://international.ohmynews.com/>> accessed 21 July 2012.

³⁹ Jack Schofield, ‘Hacks of all trades’ (*The Guardian*, 22 July 2004)

<<http://www.guardian.co.uk/technology/2004/jul/22/media.newmedia>> accessed 21 July 2012.

⁴⁰ Stuart Allan, *News Culture* (3rd edn, McGraw Hill OUP 2010) 231.

⁴¹ (n 40) 234.

Organisations such as *Reporters without Borders* and *Global Voices Online* and numerous other organizations rally behind bloggers, and in the case of *Reporters without Borders*, the organisation refer to political bloggers as “cyberdissidents”.⁴² There has been a greater amount of recognition by media organizations seen through the creation of special awards recognizing ‘cyberdissidents’. *Reporters without Borders* awarded 2 Burmese bloggers in their 17th Annual *Reporters without Borders* Prize in the “cyberdissident” category and even initiated the first Online Free Expression Day on 12 March 2008. In November 2009, *Deutsche Welle*, the German public broadcaster, announced winners of their Best of the Blogs (BOBs) international competition for best free expression. One of the winners was Seng Jian, wife of Hu Jia, a Chinese cyberdissident who was jailed for inciting subversion of state authority, and the other was an Iranian online magazine, *Change for Equality*, which advocated a change in laws that discriminate against women. These initiatives evidence a more accepting culture by media organizations of recognizing citizen journalism as playing an important role in contributing to news and advocating free speech and expression.

4.3 Evolution of social media platforms – The *Twitter* era

The recent trend is getting news across in bite-sizes with the emergence of microblogs such as *Twitter*,⁴³ very much keeping with the nature of such media being driven and transformed by technology. The remarkable properties of the technology play a key role in advocating citizen journalism. First there is a collapse of time taken in a developing story where with use of microblogs such as *Twitter*, short snippets of what is happening can be relayed to a huge number of people depending on the strength of followers and carried further on *rss* feeds and similar Internet ‘carriageways’. *Twitter* has emerged as a powerful tool for organising political protests in recent times, such as in Tunisia in January 2011, or disseminating information of such protests as in the case of the Green Revolution in Iran in June 2009.

⁴² A cyberdissident uses ICT tools available on the world wide web such as blogs to voice political dissent, to fight oppression and promote freedom. It includes organizing, communicating and strengthening networks amongst political activists. Adapted from *CyberDissidents.org* <<http://cyberdissidents.org/whoweare.html>> accessed 21 July 2012.

⁴³ See <www.twitter.com> accessed 21 July 2012. It is a short messaging service platform where the short messages known as “tweets” which cannot exceed 140 characters. A person who has a twitter account can follow other users’ tweets and be followed.

In the UK, the *Trafigura*⁴⁴ controversy of 2009 exploded on both traditional media outlets and *Twitter* when an MP disclosed in Parliament the granting of a super injunction.

3G technology enabled the web to be accessed through mobile phones which allowed information to be uploaded, updated and reported at a speed unparalleled, raising controversies such as whether journalists could tweet during court proceedings. On the acceptance of sending *tweets* during the course of a court hearing where mobile phones are prohibited in court for practical reasons such as to avoid any form of disruption, in December 2010 Chief Magistrate Howard Riddle allowed reporters to send *tweets*, during Julian Assange's extradition case hearing in the UK, on the condition that it was done "quietly" and "did not disturb" the court. The Magistrate may have weighed his ruling on the lecture delivered by the Right Honourable Lord Chief Justice of England and Wales, Lord Judge at the Judicial Studies Board lecture in Belfast on 16 November 2010 wherein His Lordship was commenting on the impact of technology in jury trials.⁴⁵ In discussing the impact of *Twitter* in court proceedings, His Lordship identified a lack of prohibition on 'the use of text-based remote transmission of material from a courtroom, whether transmitted by an internet-enabled mobile phone, or a laptop computer, or in any other way' where the prohibition under section 9 of the 1981 Contempt of Court Act is clear. It prohibits the use in court of any tape recorder or other instrument for recording sound except with the leave of the court. On the question whether the prohibitions should extend to *Twitter*, His Lordship commented that the 'question has yet to be decided, and the decision may have a considerable impact on our processes.'

Whilst the platform allows information to be publicised immediately upon the occurrence of an event, the risk of the information being inaccurate is higher, with little opportunity for reflection of the impact of the information or the assessment of the said risk.

⁴⁴ Paul Farrelly, MP, asked the Secretary of State for Justice four written questions in the Order for Business (or commonly known as the Order Paper) of the House of Commons one of which was 'what assessment he has made of the effectiveness of legislation to protect (a) whistleblowers and (b) press freedom following the injunctions obtained in the High Court by (i) Barclays and Freshfields solicitors on 19 March 2009 on the publication of internal Barclays reports documenting alleged tax avoidance schemes and (ii) Trafigura and Carter-Ruck solicitors on 11 September 2009 on the publication of the Minton report on the alleged dumping of toxic waste in the Ivory Coast, commissioned by Trafigura.'

⁴⁵ Lord Judge, LCJ, *Jury Trials*, Judicial Studies Board Lecture, Belfast (16 November 2010)
<<http://www.judiciary.gov.uk/NR/rdonlyres/CBB8FE3E-ACEB-49EE-B004-A0AAD2AAC3F8/0/speechlcjjurytrialsjsblecturebelfast.pdf>> accessed 21 July 2012.

4.4 The audio and visual platform – *YouTube* and more

Other forms of citizen journalism took on an audio and visual character with the uploading of videos to get the news and message across. *YouTube* became important in relaying powerful images as opposed to text-based information or news with video-based citizen journalists who treated *YouTube* as their “newsrooms”. SNS came on board as a social media tool when *Facebook* introduced a facility where causes could dedicate pages for users to follow and support. *MySpace*, *Facebook*, *Bebo*, *YouTube* and many facilities are mushrooming to allow users to register blogs, enter personal notes, upload pictures and videos and forums serve the utility of citizen journalism. Websites such as *blogspot.com*, *Spaces* on *Windows Live*, *tumblr* and *wordpress* provide the space and the ability for bloggers to be directly accessible to anyone. Another notable property is the extent to which people are empowered to be informed and also talk back as the Internet blurs the distinction between ‘speakers’ and ‘listeners’ as identified in *ACLU v Reno 1*.⁴⁶

4.5 Sharing – user empowerment of content

Another emerging phenomenon is the interconnectivity of the various technological media where stories are carried on a multitude of platforms. Take for instance *NowPublic* which carries the tag line ‘Crowd Powered Media’. It is a participatory news network which mobilizes an army of reporters to cover the events that define our world. In a short time, the company has become one of the fastest growing news organizations with thousands of ‘reporters’ in over 140 countries. During Hurricane Katrina, *NowPublic* had more reporters in the affected area than most news organizations have on their entire staff. In 2005, it became a recognized leader in the emerging field of citizen journalism. In 2007, *TIME* Magazine named *NowPublic* one of the 50 Best Websites⁴⁷ and in 2009, the site was nominated for an Emmy Award for Advanced Technology. By harnessing the wisdom of crowds and tapping into the news-creating potential of the hundreds of millions of Internet users, bloggers and photography enthusiasts, *NowPublic* is changing the way news is made and distributed. Take for example a story available on 20th April 2009, Monday, titled ‘1,500 Farmers in India Commit Suicide: A Wake-Up Call for Humanity’ was posted by one of the

⁴⁶ (n 27) 843.

⁴⁷ The list contains the best websites that are ‘the best examples of what’s new and exciting’, ‘sites with exceptional style and smarts’ offering ‘new and improved ways to access and share content, generate our own and otherwise enrich the online (and off-line) experience’;
<http://www.time.com/time/specials/2007/article/0,28804,1633488_1633530_1633569,00.html#ixzz1QC9zVj5b> accessed 21 July 2012.

subscribers with the name *mtippet*. The story originated from *intent.com* written by Mallika Chopra⁴⁸ and was also carried on *Huffington Post*.⁴⁹

Many of the stories are highlighted, pushed to the fore and brought to the attention of subscribers by ordinary people who feel such stories are of importance and newsworthy. In Malaysia, the explosive controversy surrounding the publishing of photographs of Elizabeth Wong,⁵⁰ a member of the opposition party was carried on blogs and *rss* feeds with people being more informed of the controversy through such mediums rather than the mainstream media. Further, the ability to share information using share facilities on these platforms created a convergence that allowed information to permeate to a larger audience. For instance, bloggers often use *Twitter* to attract readership to their blogs.

On the point of sharing of news and views, a relationship that has been formed as a result of the crossover of information is one between the mainstream media and citizen journalism on social media platforms. The mainstream media has increased its awareness of the news generated by citizen journalists and are reporting it on mainstream media channels. This demonstrates a degree of recognition of newsworthiness of citizen journalism.

5. The phenomenon in Malaysia

In the context of Malaysia, political blogs are immensely significant. The reasons for the popularity of blogs, whilst being manifold, are easily identifiable. Blogs serve as a source of 'alternative' news providers in view of the strict legal and executive controls that are imposed on mainstream media. Owing to the nature of blogs, these act as a 'soapbox', a virtual 'speaker's corner, for voicing an opinion through postings, and as forums to exercise freedom of speech and expression as readers can add comments following the postings on the blogs, airing their frustrations against the government or the opposition even. It is therefore no surprise that the blogosphere was buzzing with activity leading up to the

⁴⁸ Mallika Chopra, '1,500 Farmers in India Commit Suicide: A Wake-Up Call for Humanity' (15 April 2009) <<http://www.intent.com/blog/2009/04/15/1500-farmers-india-commit-mass-suicide-wake-call-humanity>> accessed 21 May 2009.

⁴⁹ Mallika Chopra, '1,500 Farmers in India Commit Suicide: A Wake-Up Call for Humanity' (*Huffington Post*, 16 April 2009) <http://www.huffingtonpost.com/mallika-chopra/1500-farmers-in-india-com_b_187457.html> accessed 21 May 2009.

⁵⁰ Scandalous photographs of Elizabeth Wong, a member of an opposition political party and a State Assemblywoman, were spread on the Internet which led to her resignation from her post as an Executive Committee member of her party and her State seat on 27 February 2009.

general elections in 2008 and thereafter. Alternative online news media that carried blogs became a pivotal point for public debate. Opposition parties and their leaders were able to engage with the public through their websites and blogs.

The process of 'listening' and 'speaking' in Malaysia on the Internet, it is submitted, came in stages.⁵¹ The first stage involved 'listening' which can be seen as encompassing a process of accessing the Internet and retrieving information. Malaysians became all too familiar with the filtering of information available to the public through the media during the trial of the then Deputy Prime Minister, Anwar Ibrahim (now leader of the opposition party, *Keadilan*), who was tried on corruption and sodomy charges in 1998 with the trials carrying through to 1999 and 2000, respectively. Malaysians sought alternative news sources on the Internet, in particular foreign news sources, to provide them the details that had been filtered out in the local news coverage.

The next stage was how the Malaysian media started looking for "free" 'spaces' on the Internet, to not only receive information but also to generate it. Several journalists banded together to set up *Malaysiakini*,⁵² the country's first purely virtual news site, led by journalist, Steven Gan. Features which attracted attention were the blogs that were hosted on this website. The most prominent is the famous blog 'Screenshots' run by Jeff Ooi. In recent times, the *Malaysia Today*⁵³ website hosting Raja Petra Kamaruddin's blog has overwhelmingly attracted the attention of the public and the government alike. The nature of these blogs was clearly socio-political.

The third stage was where individuals were seeking out spaces of their own as 'speakers'. With blogs, individuals were given the opportunity to be content-producers, putting out news and commentary without the presence of any gatekeeper. At a level never before experienced by the average Malaysian, individuals could now participate on these blogs by adding commentary to the various posts. It was reported in 2008 following a study that

⁵¹ Jaspal Kaur, 'Citizen Journalism on the Internet: A Taste of Freedom of Expression - the Malaysian Experience' presented at the Annual Student Human Rights Conference 2009 - Beyond Words: Freedom of Expression and its Contemporary Challenges, 14 March 2009, University of Nottingham.

⁵² *Malaysiakini*, <www.malaysiakini.com> accessed 21 July 2012.

⁵³ *Malaysia Today* <www.malaysiatoday.com> accessed 21 July 2012.

there are 500,000 bloggers in Malaysia.⁵⁴ Most of these serve as personal journals, but a survey conducted by Microsoft MSN and Windows Live Online Services Business titled 'Blogging Asia: A Windows Live Report' published in November 2006, showed that although only a small percentage engaged in citizen journalism, they were attracting a large following.⁵⁵ The report showed that political blogs were 'quite popular' amongst Malaysians with 20% of the participants surveyed responding that 'this type of blog as being of interest.'⁵⁶ The report even posed the question whether blogging represented the 'new fourth estate' with the survey showing a high level of trust in blogs serving as source of information 'with half of respondents believing that the blog content is as trustworthy as traditional media' and a quarter responding that it is 'the quickest way to learn about news and current affairs.'⁵⁷ Opposition political parties have also jumped on the bandwagon allowing them to utilize an unregulated platform to put across their policies and message. Prominent leaders of these parties often 'dialogue' with their constituents on their blogs.

The fourth stage is how online media and blogs have been used as a tool to organize the 'speakers' in order to 'assemble' in a virtual environment or in the real one. A non-government organization called 'BERSIH'⁵⁸ which represents the 'Coalition for Clean and Fair Elections' whose aim is to campaign for electoral reform organized a rally with most of the publicity for the event being distributed through online alternative news sites and social media platforms comprising mainly of blogs. The rally was held on 10 November 2007 in the capital city, Kuala Lumpur, resulting in the government using measures such as traffic blocks on roads accessing the city to prevent crowds from gaining entry into the city to participate in the rally, and, for those who managed to enter the city, tear gas and water cannons were used to disperse the crowds. While the story was carried as one of the top stories of the day on international news channels, it was a given little attention by some of the pro-

⁵⁴ See 'Blogging in Malaysia ranks among highest in the world' (*The Star*, 3 April 2008) <<http://thestar.com.my/news/story.asp?file=/2008/4/3/nation/20827588&sec=nation>> accessed 21 July 2012. In reference to more recent statistics in 2012, Malaysia ranks at number 14 as one of the top blogging nations in terms of total number of blogs as well as in terms of number of blogs calculated against the population. See 'Inside Blog Demographics' (Syomos, June 1010) <<http://www.sysomos.com/reports/bloggers/>> accessed 21 July 2012, with the US and UK being the top 2 and in that order.

⁵⁵ (n 23).

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ In the Malay Language, meaning "clean".

government newspapers such as the *New Straits Times*.⁵⁹ There was however extensive coverage on blogs, individuals uploading photos on SNS and videos being uploaded on *YouTube*. Unlike mainstream media, the coverage of the rally by citizen journalists was extensive and was demonstrative of the real impact of the rally on its citizens as well as the political environment in the country.

The general attitude towards mainstream media is that the information is heavily filtered through extensive gatekeeping. This is as a result of legal requirements imposed on the mainstream media – discussed in Chapter 5. Controversies on blogs and *twitter* have served to make the citizenry well informed and engaged with socio-political issues affecting the average Malaysian.

6. The debate: merits and demerits of citizen journalism

The reasons for the popularity of blogs or citizen-generated media on the Internet are manifold. These reasons accord citizen journalism on the Internet with credibility for being an alternative to the mainstream media. Whether in countries where there is a controlled media or a liberal one, the mainstream media is tainted with perceived deficits that there is extensive gatekeeping whereby information is being filtered or censored and the news that reaches the public is selective. These deficits may exist for a variety of reasons depending on the regulatory regime in place, ownership and the extent freedom of expression or the rights of the media are respected. In the case of a state such as Malaysia where the authorities are quick to exercise their powers of suspending or revoking the licenses of newspapers and broadcasters, the media is sterilized or subjected to being timid in the way news is carried leading to a 'strain against, rather than with the grain of citizenship'.⁶⁰

Another possible reason for this deficit could be the focus of news stories of established mainstream media whether in print or online may not be of interest to both the readers and users of the blogosphere. For instance, in the US, the PEJ's New Media Index for 9th to 13th February 2009 showed that apart from the biggest main story being carried both on the old and new media platforms, the other big stories on the blogosphere and other new media

⁵⁹ Information on ownership according to *Media Guide* (Whitelight Communications Sdn Bhd 2003) 7; quoted in 'Freedom of Expression and the Media in Malaysia' (Dec 2005) 40 (A report prepared by ARTICLE 19 and SUARAM).

⁶⁰ See Andrew T Kenyon, 'Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore, and Australia' (2010) 4 *International Journal of Communication* 440-467.

‘revealed an online discussion that diverged dramatically from traditional media news agenda.’⁶¹ In explaining the reason for the divergence, PEJ observes that most mainstream media stories are given prominence in terms of the breadth of their appeal whereas the social media focuses on topics which serve online communities who have narrower interests. For that particular week’s index, the majority of the discussion on all media both the blogosphere and mainstream media surrounded the news of Congress approving a stimulus package to counter the economic crisis. Apart from this main story, none of the other top stories in the two realms were similar.

The other mainstream media’s top stories were the discussion of the new Obama administration, the commuter plane crash near Buffalo, the Israeli elections and the Australian wildfires whereas the blogosphere was dominated by stories on New York Times personal finance article on how to save money on glasses and contact lenses, discussion on the return of plenary indulgences to moderate the punishment for sin within many Catholic churches, nostalgia on Muppet and Sesame Street characters and the possible bankruptcy of the satellite radio company Sirius XM. The differences in the main stories covered provides an interesting reflection on issues that the public is interested in and issues the public clearly want to engage in discussion with.

In view of the increased awareness of the crisis of public communication when the role of the traditional mainstream media as the Fourth Estate is dwindling, the blogosphere and political commentary has been seen as the Fifth Estate particularly in Asia, as discussed above, and the Middle-east.⁶² There is no turning back for Malaysia as the democratisation of technology is seen as a natural evolution as a result of an emerging educated middle-class which is increasingly connected. From the impact of the last elections and the continued following it has received since then, citizen journalism facilitated by the Internet is without doubt perceived and used as a tool of magnifying and multiplying democratic participation

⁶¹ ‘PEJ New Media Index: Feb 9-13, Beyond Stimulus Blogger Focus on Pupils, Penance and Puppets’ <http://www.journalism.org/index_report/beyond_stimulus_bloggers_focus_pupils_penance_and_puppets> accessed 21 July 2012.

⁶² ‘Media & Mass Communications: Coverage of popular uprisings in Arab world under spotlight as never before’ (*Al Arabiya News*, 30 April 2011) <<http://www.alarabiya.net/articles/2011/04/30/147249.html>> accessed 21 July 2012.

and, borrowing a quote from Sam Pitroda,⁶³ ‘no amount of effort can put information back in the hands of the few’, to be isolated, concentrated and controlled. The continued struggle of trying to attain some form of harmony between the law and technology is a healthy oscillation in the context of a developing legal system and democracy like Malaysia.

In the case of Malaysia, the new possibilities of communication offered by the Internet developed new streams of channelling media which was uncensored, unlicensed and largely unregulated, although the thesis will address the legal attempts to regulate it indirectly. And the social acceptance and attitude of consumers of information of this new media can be seen by the popularity of blogs. Political blogs which were seen as controversial and engaging acted as an alternative to the mainstream institutionalized media reaching dizzying heights of popularity in the lead-up of the general elections in March 2008 and thereafter. Credence was given to such blogs by political analysts who commented that they were the reason for the denial of a two-thirds majority of the ruling party in Parliament by the electorate in the general elections held on March 8 2008 for the first time in the history of Malaysia since independence. The Asian Network for Free Elections (ANFREL) carried a ‘A Brief Report on Malaysian 12th General Election 8th March 2008’ prepared by the National Institute for Electoral Integrity (NIEI) in which the report made specific mention of the role of “alternative media” in the general elections. The report commented that there was an increased reliance by the opposition on alternative media, who largely have no access to the mainstream media. The report made reference to the usage of video postings on *YouTube*, blogs and Internet news portals.⁶⁴ Another study conducted by the Media Department of the University of Malaya, reported in a Malaysian newspaper, the findings of which showed ‘the power of blogs in influencing the thinking of the people, especially about politics.’⁶⁵ The research also was indicative of how the outcome of the elections was influenced by the information on the blogs and that 70% of the elections results were influenced by this information. The impact of this form of new media in the democratic process has continued in the post-elections period as part of a mechanism of debating issues impacting the

⁶³ Sam Pitroda, ‘Development, Democracy and the Village Telephone’ (Nov-Dec 1993) Harvard Business Review 66, 79.

⁶⁴ ‘A Brief Report on Malaysian 12th General Election 8th March 2008’ (National Institute for Electoral Integrity and The Asian Network for Free Elections).

⁶⁵ (n 54). The impact of blogs and *Twitter* was harnessed by the Obama campaign to the run up to the US Presidential elections.

citizenry and it brings into practice public journalism, as discussed in Chapter 2, where citizen journalists engage in civic and public discourse with other citizens through Web 2.0 technologies creating a new version – Public Journalism 2.0. .

The power interplay between the media and the democratic process has drawn great commentary. McNair reinforces the importance of the media in the democratic process:

That the actions of government and the state, and the efforts of competing parties and interests to exercise political power, should be underpinned and legitimized by critical scrutiny and informed debate facilitated by the institutions of the media is a normative assumption uniting the political spectrum from left to right.⁶⁶

Pavlik as far back as 2001 commented that there has been an increase in civic journalism.⁶⁷ Rosen, an authority on public journalism, commented that public journalism leans to ‘citizens as participants, politics as problem solving, democracy as thoughtful deliberation’.⁶⁸ Advocates of public journalism view journalists as the catalysts of the political theory known as “deliberative democracy” which has the ability of putting the abstract notions of this theory into practice and in turn, political theory can facilitate in clarifying the democratic values promoted by public journalists.⁶⁹

It is also argued that, for instance, online participation by individuals on news items online renders the presentation of news by professional journalists open to a high degree of contestation. This is not limited to a participation environment. Blogs can counteract journalistic pieces with entries on their own blogs. However, Fenton summarises that some perceive that ‘limitless opportunities for anyone to have their say on anything, is decree to result in opinion and vitriol replacing the hard-won gains of investigation journalism.’ To support this, she states that the input is often not based on sustained analysis and that traditional news is replaced by “popular ranting” seen as a channel for self-publicity in place

⁶⁶ Brian McNair, *Journalism and Democracy* (Routledge 2000) 3-4.

⁶⁷ John V Pavlik, *Journalism and New Media* (Columbia University Press 2001).

⁶⁸ Discussed in Heading 3.2 of Chapter 2, (n 61) in Chapter 2. Jay Rosen, *Getting the Connections Right: Public Journalism and the Troubles in the Press* (Twentieth Century Fund 1996) 16.

⁶⁹ Albert W Dzur, ‘Public Journalism and Deliberative Democracy’ (Spring 2002) 34(3) *Polity* 313,314.

of public value ethics.⁷⁰ It is also argued that the blogosphere does nothing more than open the floodgates of unverified, de-professionalised gossip.⁷¹ These criticisms seem to be based on the threat that bloggers economically undermine traditional professional journalism having grave consequences for politics and public life.⁷² Prior to its acquisition by AOL, the *Huffington Post*, one of the most linked blogs in the world, had no plans to pay the thousands of bloggers who contributed to it. This was seen as challenging the professional livelihoods of journalists.⁷³ In April 2009, the *Huffington Post* announced that it was starting its own investigative journalism division by raising money online.⁷⁴ The move to hire experienced investigative journalists was justified on the basis that the mainstream media is not investing enough in it. This is also seen as narrowing the bridge of the dichotomy of the old-new media and more importantly, muting the scepticism of traditional journalists who view blogs as amateur, unprofessional, navel gazing, shooting-from-the-hip and speculative gutter press, discussed *infra*.

The threat is not just economical but also professional as it threatens the established modes of professional journalism of what Deuze says “we write, you read”⁷⁵ dogma of modern journalism. Hermida and Thurman comment that the ‘emergence of online tools that allow broad participation in the creation and dissemination of content has repercussions for the role of journalists as conveyors of news and information.’⁷⁶ They quote Gillmor who argues that ‘people at the edges of the network have the ability to create their own news entries’. Hermida and Thurman see this as a fundamental shift instigated by UGC that undermines the dogma of modern journalism.

⁷⁰ Natalie Fenton (ed), *New Media, Old News: Journalism and Democracy in the Digital Age* (SAGE 2010) 10.

⁷¹ *ibid* 11. Fenton quotes Tony Silvia (ed), *Global News: Perspectives on the Information Age* (Iowa State University Press 2001).

⁷² *ibid* 11. Fenton quotes Jane Singer, ‘Who are these guys? The online challenge to the notion of journalistic professionalism’ (2003) 4(2) *Journalism: Theory, Practice and Criticism* 139.

⁷³ *ibid* 47.

⁷⁴ Jeff Jarvis, ‘Arianna Huffington is saving journalism’ (*The Guardian*, 6 April 2009)

<<http://www.guardian.co.uk/media/2009/apr/06/huffington-post-us-newspaper-industry1>> accessed 21 July 2012.

⁷⁵ Mark Deuze, ‘The Web and its Journalisms: considering the consequences of different types of news media online’ (2003) 5(2) *New Media and Society* 5(2) 203.

⁷⁶ (n 4) 344.

In the aftermath of the Asian Tsunami of 2004, some quarters in professional journalism perceived this differently. Allan⁷⁷ refers to the comments made by the Managing Producer of *MSNC.com*, Jonathan Dube as saying that 'This is journalism. Raw and unedited, but still journalism', and *Guardian* blogger, Neil McIntosh, writing that citizen reporting has finally found its voice, and 'delivered in a way that established media simply could not.'⁷⁸

In countries where governments regulate the media in a legislatively heavy-handed fashion or where the media is owned by the government or government-led-companies, the role of citizen journalism takes on an unparalleled significance. It has not resulted in grave consequences to politics and public life as commented by Singer *supra*,⁷⁹ but the consequences are quite the opposite. It has served in enhancing government-answerability and responsibility, increasing scrutiny of the executive and democratic debate. It has also served to bring to the world's attention the atrocities of enforcement agencies like the police, for instance, the questionable conduct caught on video, of police officers on the crackdown of protestors during the G20 summit in London in 2009, actions of controlling regimes as in the case of Burma during the anti-government monk protests in 2007 and the post-elections demonstrations in Iran in June 2009. In countries where foreign correspondents are not allowed access, much less the coverage of news, citizen journalism is seen not as an alternative but the only source of news.

With every activity that the Internet facilitates, it appears as the double-edged sword and citizen journalism on the Internet is no exception. Whilst the positive and contributory values to speech and debate that citizen journalism has managed to muster through its various platforms and activities have accorded it credibility, there are equally discrediting activities. Whilst anonymity and pseudonymity may enable individuals to speak out free from political or social reprisals and has been 'assumed for most constructive purposes',⁸⁰ it is undeniable that anonymity on the Internet and on social media platforms encourages harmful, hate and false speech when individuals can behave in an uncivil fashion as they think they are immune from reprisals. A very good illustration of this is the increased

⁷⁷ (n 8) 10.

⁷⁸ *ibid.* Quoted in Allan, reference to *The Guardian Unlimited News Blog*, 4 January 2005.

⁷⁹ (n 72).

⁸⁰ *Talley v California* 362 US 60 (1960), 65.

incidents of “trolling” on social network sites. Trolling is seen as the Internet equivalent of ‘road rage, vandalizing a grave or kicking a man when he’s down’ which takes place on online forums, *Facebook* pages and online newspaper reader comments. The nature of the comments is insulting, insensitive, provoking in nature and in certain cases, threatening and harassing. As far back as 1994, Professor Trotter Hardy commented that ‘Anonymity is power and I think it will be abused on the Net.’⁸¹ The potential to cause harm through anonymous messages on the Internet is far greater in comparison to any other medium. As it is not a medium that brings the speaker face-to-face with his/her subject, the ability to dehumanise the victims of harmful speech and remove the civility that comes with face-to-face encounters is greater.

The degree of the need for alternatives to a traditional media may not be justified in a media environment where there is already an existing pluralistic media in democracies where news journalism has established standards and codes, and where the legal framework encourages the role of the media as vital in a democratic society. Nevertheless, reliance on alternatives to the traditional media could stem from scepticism of private ownership of traditional media and the fact that it is highly consumerist and market-driven.

In the UK, the debate of the value and worth of bloggers was reduced to being the ‘spewing and rantings of very drunk people late at night’.⁸² Andrew Marr, BBC’s former political editor in making these comments, described bloggers as ‘inadequate, pimpled and single’ adding that citizen journalism has nothing to do with journalism and is not going to replace journalism.⁸³ A similar sentiment had been echoed in the past by Marr’s successor, Nick Robinson, the current political editor.⁸⁴ This was an interesting observation by the BBC presenter, considering that the BBC’s website has 100 blogs and extensively invites its readers to participate and comment on stories and news carried on its website. The *BBC School of Journalism* website on its first opening page reads – ‘We’re all citizen journalists

⁸¹ Peter H Lewis, ‘Computer Jokes and Threat Ignite Debate on Anonymity’ (*New York Times*, 31 December 1994) <<http://www.nytimes.com/1994/12/31/us/computer-jokes-and-threats-ignite-debate-on-anonymity.html?src=pm>> accessed 30 May 2011.

⁸² John Plunkett, ‘Andrew Marr says bloggers are ‘inadequate, pimpled and single’ (*The Guardian*, 11 October 2010) <<http://www.guardian.co.uk/media/2010/oct/11/andrew-marr-bloggers>> accessed 21 July 2012.

⁸³ *ibid.*

⁸⁴ *ibid.*

now – perhaps we always were... Certainly, journalists have always been citizens even if citizens haven't always been journalists'.⁸⁵ The website goes on to provide a *Citizen Journalism Guide*. It is evident that citizen journalism is viewed as an important activity contributing to the news so as to warrant a site to advice, improve and encourage it by an institution such as the BBC.

It was surprising to read of Marr's dismissive polemic of the blogosphere when evidently he too reads them for structuring his interviews. Marr questioned the then Prime Minister Gordon Brown whether Brown was taking anti-depressants which was a rumour that was rife on the political blogosphere then and Marr by referring to it brought it into mainstream news.⁸⁶ Marr's comments about bloggers and citizen journalists certainly instigated a debate with opinions mushrooming on the Internet and the blogosphere with responses that either agreed or disagreed with Marr or there were some who were more objective. Marr needs to contextualise it. In certain countries where there is no pluralism in media, the 'alternative' view has to often find alternative channels and citizen journalism has become that outlet. This has taken place in Malaysia and it was done mostly in a responsible fashion and continues to inform the citizenry and contribute to the national conversation in a meaningful way. For someone so respected, Marr's remarks were rather flippant. Citizen journalists have not set out to replace mainstream and professional journalism but appear as another outlet for comment.⁸⁷

Roy Greenslade, who is a blogger on the *Guardian* website and columnist with the *London Evening Standard*, responded to Marr's attack by writing a balanced piece⁸⁸ – as did Krishnan

⁸⁵ *BBC College of Journalism* <<http://www.bbc.co.uk/journalism/skills/citizen-journalism/citizen-journalism-guide/>> accessed 21 July 2012.

⁸⁶ Richard Evans, 'Evolution applies to everything, even Andrew Marr' (Editor's Corner, Yahoo News, 16 October 2010) <http://uk.news.yahoo.com/blogs/editors_corner/evolution-applies-to-everything-even-andrew-marr-p72042.html> 21 July 2012.

⁸⁷ My response to the story carried on the online version of the *New Statesman* in the comment section read as follows: I think Andrew needs to contextualise it. In certain countries where there is no pluralism in media, the 'alternative' view has to often find alternative channels and citizen journalism has become that outlet. I am a citizen of a country where this has happened and it was done mostly in a responsible fashion and continues to inform the citizenry and contribute to the national conversation. For someone so respected, Andrew's remarks were rather flippant. I don't think citizen journalism set out to replace mainstream and professional journalism; 'Citizen journalism will not replace journalism, says BBC's Marr' (*The New Statesman*, 12 October 2010) <<http://www.newstatesman.com/digital/2010/10/citizen-journalism-andrew-marr>> accessed 21 July 2012.

⁸⁸ Roy Greenslade, 'Andrew Marr is wrong - bloggers are good news' (*London Evening Standard*, 13 October 2010) <<http://www.thisislondon.co.uk/markets/article-23887426-andrew-marr-is-wrong-bloggers-are-good-news.do>> accessed 21 July 2012.

Guru-Murthy of Channel 4 in the *Guardian*.⁸⁹ There was the acknowledgment that bloggers can appear to have all the personality and character traits expressed by Marr but both felt the generalization was unfair. Greenslade found Marr to be outdated, reactionary and faulted him for stereotyping. Greenslade listed some of the most prominent bloggers amongst UK social media actors such as Iain Dale, Tim Montgomerie, Will Straw, Alex Hilton, Sunny Hundal and Guido Fawkes for contributing to political discourse as well as forums, websites or blogs run by local community. In defending the anonymity of bloggers, a point Marr was critical of, Greenslade commented that without anonymity, insights and information would never emerge. Alex Hilton, one of the prominent bloggers cited by Greenslade posted a comment on Greenslade's article highlighting that mainstream media can also be faulted for numerous misdemeanours stating that as 'there are nasty bloggers...there are naughty bloggers, but so far no blogger has achieved the resources required to get near the level of nastiness perpetuated by mainstream media.'

Both Greenslade and Murthy felt that the ability for social media to have the public audience talking, interacting and involving in debate is seen as progress, short of calling it democratic discourse.

To totally discredit the value of citizen journalism and UGC in the face of the realities of the impact the content has had in terms of news value appears somewhat flippant but there are some questions of credibility that are warranted. The fact-to-fiction story of the Syrian lesbian blogger is one such illustrative example where the good intentions of publicizing the plight of a marginalized and silenced section of society crossed the line when false information, in this case a fictional arrest, fuels the belief that the blogosphere is more fake than fact.

Another criticism levelled against citizen journalism is that it lacks the qualities of good journalism – balance and objectivity. Bloggers have never claimed their work to possess these qualities. As Allan accurately comments that 'blogs are inherently subjective, in line with their authors' perspectives or predispositions; indeed, for many bloggers, a non-biased

⁸⁹ Krishnan Guru-Murthy, 'In defence of the blogging masses' (The Guardian, 11 October 2010) <<http://www.guardian.co.uk/commentisfree/2010/oct/11/defence-blogging-masses-andrew-marr>> accessed 21 July 2012.

blog would be pointless, even if it was possible to achieve. Accordingly, the usually tacit, unspoken rules of mainstream reporting will more likely than not be rendered problematic by bloggers providing alternative accounts, facts or interpretations.⁹⁰ This may certainly be a stumbling block to afford bloggers the same legal protection extended to professional journalists.⁹¹

7. Hostility towards citizen journalism

News stories and reports surrounding social media or citizen-generated media often range from the repressive to the hopeful. The Press Freedom Roundup of 2008 by *Reporters without Borders* reported a higher rate of internet repression with one blogger killed, 59 arrested, 45 physically attacked and 1740 websites blocked, shutdown and/or suspended.⁹² Nevertheless the subsequent reports are indicative of the fact that the acts of repression have not silenced social media activity. In the 2010 edition of the said report, homage was paid to bloggers around the world 'who bravely defend the right to speak out'.⁹³

Arrests of socio-political bloggers for making seditious remarks or promoting anti-government sentiments have only served to make them more popular as news is carried by other bloggers and by international non-government media organizations such as *Reporters without Borders*. When bloggers are arrested, stories are carried on other political blogs giving increased prominence to the blog of the arrested blogger, as in Kamaruddin's case in Malaysia, discussed *infra*, and in some cases, others take on the responsibility in carrying on the blog, such was the case in al-Farhan's case in Saudi Arabia.⁹⁴ A new kind of civil martyrdom is appearing. The reality of the situation is that any action taken against bloggers is somewhat like spitting in the wind. Governments may attempt to block blogs, but these are still accessible through mirror sites and many more may mushroom if one is blocked.

Many States have evoked legal and policy responses, discussed in Heading 8 *infra*, in controlling speech by citizen journalists on the Internet. In certain circumstances, these laws

⁹⁰ (n 8) 85.

⁹¹ Discussed in Chapter 5 and 6.

⁹² Press Freedom Round-up 2010, *Reporters without Borders* <www.rsf.org/Press-Freedom-Round-up-2008.html> accessed 21 July 2012.

⁹³ Press Freedom Index 2010, *Reporters without Borders* <<http://en.rsf.org/press-freedom-index-2010,1034.html>> accessed 21 July 2012.

⁹⁴ Faiza Saleh Ambah, 'Dissident Saudi Blogger Is Arrested' (*Washington Post*, 1 January 2008) <<http://www.washingtonpost.com/wp-dyn/content/article/2007/12/31/AR2007123101915.html>> accessed 1 July 2013.

and policies have yielded results in regulating social media activities, for instance in arresting bloggers or initiating legal suits against them. In examining whether these actions have yielded any overarching success – such as muting the blogosphere or failure to have any impact at all on its buzz – it is unlikely such responses have worked. Legal actions against social media actors more often serve to encourage the popularity of such actors by drawing attention to it. State responses have drawn equal amount of attention. *Reporters without Borders* has for some years produced a list of states that were recognised as “Internet Enemies” or as “Enemies of the Internet” and continues to monitor states. It has even introduced a ‘*World Day Against Cyber Censorship*’ which it celebrated last on 12 March 2010 reporting that 120 bloggers, Internet users and cyberdissidents have been imprisoned - with the largest number in China, followed by Vietnam and Iran.

Various organisations that have taken the role of monitoring states have grown. Apart from *Reporters without Borders*, these include organisations such as the ONI (*Open Net Initiative*) or region-specific monitoring, for instance, by *Asia Pacific Censorship News*. The consistency of the monitoring done provides a good basis to study the trends of the mechanisms utilised by states in regulating social media activities whether in the enacting of laws or adopting of policies.

8. Current Approaches in Regulating Social Media

When studying legal trends and state policies and actions taken towards citizen journalists on the Internet across countries, in particular bloggers, a pronounced pattern emerges and this can be divided generally into two approaches. The first approach is the use of repressive laws often comprising of draconian legislation such as detention-without-trial provisions coupled with technical obstacles leading to Internet crackdowns such as arrests of cyberdissidents who are anti-government activists using the various platforms available on the Internet and blocking of sites that carry their message. Countries such as China, Iran, Saudi Arabia and Burma, just to name a few, deal with cyberdissidents in the harshest possible way imposing long terms of imprisonments. The second approach is the enactment of laws that promote access to the Internet – the cyberlibertarian favoured approach. In

countries like Iceland⁹⁵ and Finland,⁹⁶ and several states in the US, laws have been enacted with the aim of promoting access to the Internet and protecting freedoms on the Internet. The case studies involving Malaysia, UK and the US evidence the utility of a combination of more than one approach in controlling socio-political speech on social media platforms. In either approach, there are instances where there is adoption of technology specific laws, the *lex specialis*, or policies such as, *inter alia*, in the UK (discussed *infra*), Malaysia (discussed *infra*), South Korea and Italy.⁹⁷

8.1 Malaysia

In the case of Malaysia, the approach taken is a combination one where both approaches are adopted. In 2008, Malaysia's first brush with socio-political bloggers resulted in numerous prosecutions in an era in the country's development when the knowledge economy was seen and continues to be seen as vital to its economic success. In this spirit, the *lex specialis* was enacted specifically with the objective of regulating ICT activity as a result of the promotion of the Multimedia Super Corridor⁹⁸ in 1996 when an executive guarantee was made by the government that there will no censorship of the Internet in order to attract investors. The said guarantee found its way into the *lex specialis*. The discussion of the current approaches to regulation commences with the general attitude towards media and free flow of information.

Control of the media through the use of legislation is not a new exercise in controlling the flow of information or its content. The statutes that regulate traditional media and have been used against media entities include, *inter alia*, the Printing Presses and Publications

⁹⁵ Icelandic Modern Media Initiative, a policy to enact laws which guarantee freedom of expression and communication on the Internet.

⁹⁶ Right to internet access is deemed as a fundamental right under its constitution. 'Finland makes broadband a 'legal right'' (*BBC News*, 1 July 2010) <<http://www.bbc.co.uk/news/10461048>> accessed 19 January 2012.

⁹⁷ The Korean Communications Standards Commission regulates Internet content. The Italian government is in the process of introducing a Gag Law to protect people from online defamation where non-rectification or non-removal of libellous statement within 48 hours from complaint made would result in a hefty fine.

⁹⁸ The Multimedia Super Corridor or more popularly known as the MSC project played a pivotal role in making Malaysia connected and technology-savvy. This led to the building of supporting infrastructure and the education of the public in embracing information and computer technology. The MSC is a designated zone which is designed to leapfrog the country into the information and knowledge age. The corridor houses certain core initiatives known as 'flagships' which includes amongst others, e-Government, Telemedicine, Smart Schools, Multipurpose Smart Card System, e-Business and Technopreneur Development and others. Part of the initiatives was to introduce comprehensive 'cyberlaws' governing electronic commerce, information and communication technology and the multimedia industry. The entity which is largely responsible for the formulations of these laws is the Malaysian Communications and Multimedia Commission (the Commission, for short) established under the Communications and Multimedia Act 1998 and comes under the purview of the Ministry of Energy, Water and Communication.

Act 1984, Internal Security Act 1960, Sedition Act 1948 and the Defamation Act 1957. It is therefore no surprise that a similar attitude has been transferred and adopted in controlling social media on the Internet. Primarily, the 'need' for space pivots on the fact that there is a curtailment of freedom of speech and expression in general and in the media, in spite of the fact that there are provisions in the Federal Constitution that enable such freedoms. In the past few years, Malaysia has utilised old repressive laws to mute bloggers and yet has also enacted cyberlibertarian-like *lex specialis* legislation, namely the Communications and Multimedia Act 1998. The provisions that are often invoked in suppressing online speech are sections 211 and 233 of the Communications and Multimedia Act 1998.⁹⁹

An example of a plethora of legislation being used against bloggers can be seen in the action taken by the government agencies against Raja Petra Kamaruddin, possibly the most politically vocal Malaysian blogger. Section 233 of the Communications and Multimedia Act 1998 was invoked by the Multimedia and Communications Commission against *Malaysia Today* that hosts Raja Petra Kamaruddin's blog. The blog was blocked on 11 September 2008 through an order issued by the Communication and Multimedia Commission to 19 Internet service providers. The government directed the Commission to re-instate access in order to keep with its guarantee that there will be no censorship of the Internet. The government under the Multimedia Super Corridor has guaranteed non-censorship of the Internet, which is encapsulated in section 3 of the Communications and Multimedia Act. The government, it was reported, denied that it had ordered the said blocking and took a stand that it had merely given the Commission general instructions that all blogs and websites should be allowed to function as long as they were in adherence to the Communications and Multimedia Act 1998.¹⁰⁰ In invoking section 233 above, the question that was raised was whether it was the appropriate section to be invoked. The Home Minister commented

⁹⁹ Section 211 prohibits the providing of content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person by a content applications service provider, or other person using a content applications service. Section 233 provides for the offence of improperly using network facilities or network service to initiate the transmission of, any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or initiate a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person.

¹⁰⁰ Daniel Chandranayagam, 'Whose Decision to Block Malaysia Today?' (*Global Voices Online*, 30 August 2008) <<http://advocacy.globalvoicesonline.org/2008/08/30/who-caused-malaysia-today-to-be-blocked/>> accessed 21 July 2012.

that the website of *Malaysia Today* had the tendency¹⁰¹ to publish 'libellous, slanderous or defamatory' statements'.¹⁰²

Seen as one of the most controversial attempts at suppression were the arrests under the Internal Security Act 1950 of Malaysia's most famous blogger, Raja Petra Kamaruddin. Kamaruddin was arrested on 12 September 2008 under the detention-without-trial provisions found in the Internal Security Act 1950. Section 8 of the said Act accords the Home Minister the power to order detention or restriction of persons whose activities are 'prejudicial to the security of Malaysia'. He was later released by the High Court on 7 November 2008 on a successful application for a writ of habeas corpus for his release claiming that his detention was unlawful under the said Act. The High Court ruled that the detention order by the Home Minister did not fall within the ambit of section 8(1) of the said Act as the issuance of the said order was on the basis that Kamaruddin's online articles insulted Islam and government leadership and not because his articles were prejudicial to the security of the nation.¹⁰³

Kamaruddin also has pending sedition charges brought against him back in October 2008. The charges arose as a result of a blog post on 25 April 2008 suggesting involvement of the then Deputy Prime Minister and present Prime Minister, Najib Razak, and his wife in a high profile murder trial involving the gruesome death of a Mongolian woman. The case has come to be known infamously as the *Altantuya* murder trial, after the name of the said woman. Prior to the sedition charges, Kamaruddin was charged with three counts of criminal defamation in relation to a statutory declaration he had made implicating Najib Razak's wife amongst others. Although he had claimed trial to these charges in July 2008, he failed to show up for the trial in April 2009. The case is still pending.

¹⁰¹ *Malaysiakini*, an online news portal describes itself as an alternative news provider and provides news which is viewed by the government as controversial as it runs counter to other mainstream media entities that are heavily regulated.

¹⁰² 'Malaysia Today controversy gets hotter (Update 4)' (*The Star*, 28 August 2008) <<http://thestar.com.my/news/story.asp?file=/2008/8/28/nation/20080828134908&sec=nation>> accessed 21 July 2012.

¹⁰³ *Raja Petra bin Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri* (2008) (unreported) (High Court, Shah Alam, Petition No 44-217-2008).

In reference to other sections in the Communications and Multimedia Act 1998, sections 211 and 233 were recently invoked against *Malaysiakini*, an online news portal.¹⁰⁴ The Commission vide a letter had ordered the news portal to remove two videos seen as ‘provocative and offensive videos’ posted by *Malaysiakini* on *YouTube* as a result of complaints received by the Commission. The controversy of these videos surround the footage of the controversial ‘cow-head’ protests as a result of the decision taken by a State government to allow for a Hindu temple to be relocated to a neighbourhood. The residents of this neighbourhood opposing this decision took the protest to the streets and central to this protest was the desecration of a cow’s head as the cow is considered sacred to Hindus. The editor of *Malaysiakini* took the stand that these videos are of public interest and that they were merely doing their job as journalists. Increased use of videos on online news websites have become the norm where the use of videos to relay the story paints a powerful imagery just as photographs play the same role in print newspapers. This raises questions of sensationalizing news but then again, this inquiry is not new to news reporting and media. More importantly, the coverage of the incident and the unquestionable details of the event would not have been publicised as a prominent story of public interest by the mainstream media. Hence, alternative media became the conduit and justified its position to carry the story in both text and video format, with truth and accuracy.

In terms of using section 233 against bloggers, the section was invoked against Khairul Nizam Abdul Ghani when he was accused of insulting the Sultan of the State of Johor by posting derogatory remarks on his blog.¹⁰⁵ He is awaiting trial upon entering a plea of not guilty. On a similar note, eight “internet users” were charged for making online comments on blogs and web postings, insulting the Sultan of the State of Perak under the same section and one of the accused has pleaded guilty.¹⁰⁶

Defamation suits taken against bloggers could also result in suppression of speech if the suits result in an abuse of the justice process involving a high cost of litigation. Such suits

¹⁰⁴ ‘MCMC tells Malaysiakini: Take down videos’ (*Malaysiakini*, 4 September 2009)
<<http://www.malaysiakini.com/news/112111>> accessed 21 July 2012.

¹⁰⁵ ‘Blogger pleads not guilty to insulting Johor royals’ (*The Star*, 29 January 2010)
<<http://thestar.com.my/news/story.asp?file=/2010/1/29/nation/20100129170602&sec=nation>> accessed 21 July 2012.

¹⁰⁶ ‘Six to be charged for insulting Perak Sultan in blogs, web posts’ (*The Star*, 13 March 2009)
<<http://thestar.com.my/news/story.asp?file=/2009/3/13/nation/3472290&sec=nation>> accessed 21 July 2012.

may result in bloggers yielding to the claims to avoid the high cost. If the suits are not vexatious but are substantiated, they will serve to remind citizen journalists of the importance of editorial gatekeeping. One of the more popular newspapers in the country, *New Straits Times*, brought a defamation suit against 2 bloggers Jeff Ooi and Ahirudin Attan. The plaintiffs also applied to the court for removal of postings on their blogs - Jeff Ooi's *Screenshots* and Ahirudin Attan's *Rocky's Bru*. The postings on the blogs allegedly defamed the newspaper and several senior figures in the group that owns the newspaper. The suit was seen as a landmark assault on Internet free expression by media groups such as *Reporters without Borders* and Southeast Asia Press Alliance, to name a few.¹⁰⁷ Ooi, who started blogging since 2003, received the Freedom Blogs Awards given by *Reporters without Borders* under the Asian category.¹⁰⁸ The case against Ooi and Attan has been dropped as the bloggers have apologised to the plaintiffs in the said case.¹⁰⁹ The possibility of claimants seeking injunctions against the writing of blogs and exorbitant claims of damages could deter open and free discussion of public interest issues resulting in the chilling effect on free speech.¹¹⁰

When bloggers are arrested, stories are carried on other political blogs giving increased prominence to the blog of the arrested blogger. In Kamaruddin's case, his wife and colleagues continued to publish when he was arrested under the Internal Security Act.¹¹¹ This is not unlike other cases involving arrested political bloggers. The suppression of the blogosphere through the arrests of bloggers only attracted increased attention from the

¹⁰⁷ 'Press fears over Malaysia blogs lawsuit' (*Channel News Asia*, 21 January 2007)

<http://www.channelnewsasia.com/stories/afp_asiapacific/view/253789/1/.html> accessed 21 July 2012.

¹⁰⁸ 'Blogs lauded in 'freedom awards'' (*BBC News*, 17 June 2005)

<<http://news.bbc.co.uk/1/hi/technology/4099802.stm>> accessed 21 July 2012.

¹⁰⁹ 'Kalimullah drops suits against blogger Ahiruddin after latter apologises' (*The Edge*, 31 January 2012)

<http://www.theedgemaalaysia.com/index.php?option=com_content&task=view&id=200215&Itemid=77> accessed 21 July 2012.

¹¹⁰ See the case against Malaysian blogger, Charles Hector, who blogged about abuse of migrant workers – 'Malaysian Blogger Defamation Case – Cause for Concern' (*Global Voice Online*, 28 June 2011)

<<http://advocacy.globalvoicesonline.org/2011/06/28/malaysia-blogger-defamation-case-cause-for-concern/>> accessed 21 July 2012; Also see the case against blogger Amizuddin Ahmat, who had posted a story from another online source defaming the Minister of Information, Communications and Culture, "Prison Sentence Deferred", (*Reporters without Borders*, 30 August 2012) <<http://en.rsfor.org/malaysia-opposition-blogger-ordered-to-pay-20-07-2011,40659.html>> accessed 21 July 2012.

¹¹¹ Shawn W Crispin, 'Malaysia's Risk-Takers' (*The Committee to Protect Journalists*, 14 October 2008) <<http://cpj.org/reports/2008/10/malaysia08.php>> accessed 21 July 2012.

public and not to mention international condemnation, leading to Malaysia being listed on the Reporters without Border's report, Internet Enemies.¹¹²

The first approach taken has not yielded results. The blocking of website in the case of *Malaysia Today*, was not seen as effective as Kamaruddin's blog was still accessible through mirror sites. Ironically, there were blogs that carried instructions on how to access Kamaruddin's blog in spite of the blocks by local ISPs. This leads to another related point of the action taken against bloggers serving to unite and organize bloggers. A form of this solidarity can be seen in the establishing of an organization called the National Alliance of Bloggers. The Malaysian Bar Council set up a committee of volunteer lawyers to provide bloggers with legal assistance. More importantly, the legal suppression of bloggers in Malaysia has only served to make them more popular with an increased readership and international spotlight, creating a kind of civil martyrdom.

Under the new premiership in 2009, a positive initiative has been the setting up of a committee by the Prime Minister for a review of the Internal Security Act – an Act that has been used against Kamaruddin. However, there have been increased calls from the government that it will not hesitate to invoke the Communications and Multimedia Act against the blogosphere in controlling content posted online. The Malaysian Minister of Culture and Communication has gone as far as suggesting a proposal to install a web filtering software not unlike the "Green Dam" proposed by China aimed mainly at filtering pornography on the Internet.¹¹³ Critics of the said filtering software have voiced their concerns and view the proposal as a means of controlling content online. The government has denied that the proposed filter would be used to monitor online activity such as on blogs and websites¹¹⁴ and the proposal has since been rejected.¹¹⁵ In a letter to *Reporters without Borders* in June 2009, the authorities 'explained that censorship was not on the table, nevertheless, warning citizens not to engage in "immoral online activities" and to be "guided by their cultural and moral values" in cyberspace.'¹¹⁶

¹¹² Report available on < www.rsf.org/IMG/pdf/Internet_enemies_2009_2.pdf > accessed 21 July 2012.

¹¹³ 'Malaysia denies Internet filter will curb dissent' (*Reuters*, 7 August 2009) <<http://www.reuters.com/article/idUSTRE5763JF20090807>> accessed 21 July 2012.

¹¹⁴ *ibid.*

¹¹⁵ See report on Malaysia at <<http://en.rsf.org/surveillance-malaysia,36670.html>> accessed 21 July 2012.

¹¹⁶ *ibid.*

The most recent change has come in the form of an amendment of the Evidence Act 1950. A new section 114A has been inserted into the Act.¹¹⁷ The provision was enacted regardless of a loud public outcry against its passing in the Federal Parliament. The provision creates a rebuttable presumption of fact making users prosecutable for offences involving harmful speech online. The provision aims to achieve a chilling effect on socio-political conversation – to act as a deterrent where users are easily criminalised for their postings or online activities that may be deemed to be defamatory, seditious or that contravene the provisions of the Communication and Multimedia Act. The risk may arise in a variety of situations – firstly, if a user who sets his/her web-enabled devices to automatically sign on to the various social media platforms that are frequently used by him/her and the said devices are used by a third party, whether with or without the consent of the user, to post comments that are potentially defamatory or seditious; secondly, if a blogger who blogs on socio-political issues publishes a blog post that attracts a seditious or defamatory comment posted by a reader using a pseudonym; or thirdly, if a business provides to its customers or patrons free Internet access through a *wifi* network where anonymous users have used this access to upload or publish potentially criminal or harmful information that can be traced back to the business. In the above situations, the user, the blogger or the business will potentially be charged for the harmful speech posted and will have to rebut the said presumption in order to successfully raise a defence to the charge.

The actions taken by the government have had to be delicately balanced against its non-censorship legislative promise and in presenting itself as an economy that is attractive to investors particularly in the context of the ICT industry. Blogs and social media platforms as a source of alternative news have not ceased in becoming a popular part of national conversation and discourse.

¹¹⁷ Evidence (Amendment) No. 2 Act 2012 (Act A1432). The section provides: Sub-s (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved. Sub-s (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved. Sub-s (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

8.2 US

The approach adopted in the US is largely the second one. There is specific legislation on regulating the Internet and political bloggers but the First Amendment provides a strong impetus for promoting the right to free speech on the Internet - to be discussed in Chapter 5.

There has been an increased initiative on the part of the Obama Administration to utilize blogs as one of the ways in which US citizens can get connected with government authorities. At a political level, the Obama campaign used the blogosphere extensively and later as the Obama Administration, it is no surprise that citizens were encouraged to get in to a discourse with government bodies through blogs.

It is asserted that blogging or any speech on the Internet, whether socio-political in importance, is a democratic right protected under the First Amendment freedom of speech guarantee. There has been much discussion on whether the special constitutional protection such as shield law should be accorded to socio-political discourse on the Internet. This will be discussed later in Chapter 5.

On the issue of the regulation of blogs in particular, two initiatives require notice. The first is the announcement in May 2010 by the Obama Administration to regulate the Internet through the Federal Communication Commission (the FCC) in enforcing 'net neutrality' which is still at an early stage. It requires internet service providers to treat all traffic equally and not to slow or block access to websites. The main challenge against this incentive is that it would restrict the way providers deal with internet traffic when growing demand is placed on their network. At present, service providers are able to prioritise access to certain sites and transmission of certain type of data. If the ability of access providers to prioritise the transmission of certain types of data is removed, it will prevent discrimination of which data should be given priority. As much of social media utilizes platforms on social networking sites, web videos sites and user generated content sites (such as blog sites), data from these platforms may not be seen as having priority over important data such as emails. If the proposal is successful, access and transmission to social media platforms will be impeded. The hurdle the FCC will face in promoting net neutrality is that it will be open to challenge in

view of the DC Circuit Court of Appeals decision¹¹⁸ where the court held that the FCC had exceeded its “ancillary authority” in attempting to regulate the Internet when it made a ruling against Comcast for interfering with their subscribers’ BitTorrent traffic. The FCC relied section 4(i) of the Communications Act of 1934,¹¹⁹ which authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”

Whilst there are attempts to keep to campaign promises, other areas of the Internet where proposals are being made to regulate Internet activity and more specifically the regulation of blogs, in particular political blogs is through imposing self-disclosure. The Federal Election Commission (the FEC) is proposing the Disclose Act where it will be given authority to control broadcast communications, extended to all ‘covered communications’ including the blogosphere. The proposal however exempts traditional media outlets. The Act, when passed will require political bloggers to disclose whether they are receiving funds from political campaigns. In July 2012, the Disclose Act was blocked by the Senate although attempts are being made for the bill to become law. Previously, the FEC decided that internet activity such as blogging came under the media exemption. However, under the new law, the FEC will enquire if the blog is non-commercial, where it is seen as a volunteer activity by individuals, and then the said blog will not be subject to FEC’s regulations on restrictions of campaign finance law. The disclosure of sources of public expenditure was upheld by the US Supreme Court in an 8:1 decision in *Citizens United v Federal Election Commission*¹²⁰ where the Court stated: ‘The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.’¹²¹ From the above, the measure of the role and function of blogs can be drawn – firstly that political blogs are important tools in political activities such as elections, whereby the outreach to their readership is significant for political messages to be channelled through them; and secondly, that blogs assist in

¹¹⁸ Comcast Corp v FCC 600 F3d 642 (DC Cir 2010).

¹¹⁹ 47 USC § 154(i).

¹²⁰ 130 SC 876 (2010).

¹²¹ *ibid.*

citizens making informed decisions by making available another medium through which the diversity of information and speakers is achieved.

In the US, there is a legislative proposal to accord protection to bloggers, or social media actors in general, under federal shield law. On 15 December 2009, the Senate Judiciary Committee passed the Senate shield bill (Bill number s 448). The law defines broadly the category of persons who fall under the protected class covering any journalist who engages in 'the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.' *Reporters without Borders* believes that the 'bill's current definition extends its protection to bloggers, freelancers and any other person involved in disseminating information to the public.'¹²²

In the US, the right to speak is not absolute and where it comes into conflict with genuine and compelling interests of third parties, disclosure may be warranted. Where claimants are seeking redress arising from harmful speech, claimants seek a discovery subpoena from the court, popularly known as *John Doe* proceedings, to order ISPs, website host or social networking sites to disclose the identity of anonymous users. Such a subpoena creates the risk of the loss of one's privacy as an anonymous speaker if the claimant fails in the claim leading to potential abuse of the process arising from SLAPP (an acronym for 'Strategic Lawsuits Against Public Participation') suits. The standard to adopt in unmasking and disclosure of anonymous speakers is to undertake a balancing exercise after the claimant successfully proves that attempts have been made to provide notice to the anonymous speaker and has evidenced a meritorious claims against the said speaker. This is where the court weighs the defendant's First Amendment right to speak anonymously against the claimant's case for disclosure. A more detailed discussion of this will be undertaken in Chapter 6 namely the case of *re Subpoena Duces Tecum to America Online Inc*,¹²³ a case involving defamatory statements made about a company and disclosure of confidential insider information. It is to be noted that in several states in the US, anti-SLAPP legislation

¹²² 'Federal Shield Law Passes Senate Judiciary Committee' <<http://www.rsf.org/Federal-Shield-Law-Passes-Senate.html>> (*Reporters without Borders*, 15 December 2009) accessed 21 July 2012.

¹²³ No. 40570, 2000 WL 1210372 (52 Va Cir 26).

has been introduced such as in California, Washington and New York¹²⁴ to protect First Amendment speech.

Although there have been legal initiatives to regulate political blogging and court applications for disclosure of a user's identity, these are imposed within reason – where the court will undertake a balancing exercise between protection of First Amendment speech rights and the rights of injured parties – discussed in Chapters 5 and 6.

8.3 UK

The approach adopted in the UK is the second approach. The *lex specialis* is the Communication Act 2003. To state that the UK has adopted a cyberlibertarian approach cannot be suggested as there is no specific provision that promotes non-censorship or freedoms on the Internet. However, it can be said that Article 10 of the European Convention of Human Rights could promote a cyberlibertarian approach but it becomes complicated as we have seen that there could be potential conflicts between articles where a right in one article could trump the right in another.

One of the first few cases involving prosecution of bloggers in the UK was that of Welshman Gavin Brent, Brent wrote on his blog, which was not one of a socio-political nature, venting his frustration of his alleged mistreatment at the hands of the police by posting a threat to a police officer and the police officer's new-born baby which the court found to be 'grossly offensive and menacing', and found himself facing a fine at the Mold Magistrates' Court. Although most of the news reporting seem to indicate that he was charged under the Telecommunications Act 1984¹²⁵, the correct provision is section 127(1)(a) of the Communications Act 2003,¹²⁶ with the heading 'Improper use of public electronic communications network', which reads;

- (1) A person is guilty of an offence if he—

¹²⁴ California Code of Civil Procedure section 425.16; Washington Revised Code sections 4.24.500 - 520; New York Civil Practice Law, Rule 3211(g) and Rule 3212(h); and, New York Civil Rights Law sections 70-a and 76-a.

¹²⁵ c 12.

¹²⁶ c 21. The corresponding provisions in the Telecommunications Act 1984 were repealed by section 407(7), as enumerated in Schedule 19.

- (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) causes any such message or matter to be so sent.

In Mr. Brent's case, the prosecution established the offensive and menacing character from the posting on his blog and he was fined accordingly. It can be submitted that the *lex specialis* in the case of the UK is the Communications Act 2003.

The more prominent case in recent years has been the case involving the blogger, *NightJack*. The *NightJack*, managed to attract, at one point, a readership of up to 500 000¹²⁷ and *NightJack* was a pseudonym the writer of the blog, Detective Constable Richard Horton, used to conceal his identity. The blog which has since been silenced was characterized as relaying opinions on police work and 'on a number of social and political issues relating to the police and administration of justice'¹²⁸ and according to Hirsch, provided a 'behind-the-scenes commentary on policing'.¹²⁹ The blog was a recipient of the Orwell Prize for blogging as it provided a 'distinct voice' in an increasingly competitive field.¹³⁰ This can be interpreted as recognising the contribution of blogs and citizen journalists in providing quality meaningful conversation and discussion as well as insight into areas of interest to the public.

The author of *NightJack*, brought an application for an interim injunction in the Queen's Bench Division of the High Court to restrain the defendant, Times Newspapers Limited, from revealing his identity in *The Author of a Blog v Times Newspaper Limited*.¹³¹ A journalist of *the Times*, Patrick Foster, had been able to deduce the real identity of *NightJack* through 'a process of deduction and detective work, mainly using information available on the Internet'.¹³²

¹²⁷ Afua Hirsch, 'Publish and be named: Police blogger NightJack loses anonymity' (The Guardian, 16 June 2009) <<http://www.guardian.co.uk/media/2009/jun/16/nightjack-blogger-horton>> accessed 21 July 2012.

¹²⁸ *The Author of a Blog v Times Newspaper Limited* [2009] EWHC 1358 (QB).

¹²⁹ (n 127).

¹³⁰ (n 128) [13]; See OrganGrinder Blog, 'NightJack blog: How the Times silences the voice of valuable frontline reporter' (The Guardian, 17 June 2009) <<http://www.guardian.co.uk/media/organgrinder/2009/jun/17/nightjack-blog-times-silenced>> accessed 21 July 2012.

¹³¹ (n 128).

¹³² (n 128) [3]. It was later discovered that this was not true. On 17 January, James Harding, the Editor of the Times, gave evidence to the Leveson Inquiry that Foster had to be disciplined as it had transpired that Foster had

The Claimant submitted that '*The Times* is subject to an enforceable duty of confidence not to reveal the Claimant's identity as the author of the blog; alternatively, that he has a reasonable expectation of privacy in respect of that information, in respect of which there is no countervailing public interest justification for its publication'.¹³³ Justice Eady held in favour of *the Times*. The case will be discussed in detail in Chapter 6.

Similarly in the UK as in the US, there have been numerous cases where the courts have been asked to order disclosure of user identities from web site operators or service providers. The disclosure procedure involves a *Norwich Pharmacal* application, named after the decision of the House of Lords¹³⁴ where the conditions for such application was laid out. In essence it is where the person against whom the order is sought has facilitated the wrongdoing, s/he is therefore comes under a duty to assist the person who has been wronged by providing full information and disclosing the identity of the wrongdoers.¹³⁵ The said procedure has been successfully used in removing anonymity of Internet users where the applications have been made against website hosts where users have made defamatory remarks on the website forums.¹³⁶ These applications have been successfully made on sites hosted outside the UK.¹³⁷ Discussion on these applications will be undertaken in detail in Chapter 6 particularly in view of the application made by a UK council in a Californian court for an order of disclosure of an identity of a blogger who had made libellous statements on his blog¹³⁸ and whether such applications will be allowed in view of the European Court of Human Rights decision in *Financial Times v United Kingdom*.¹³⁹

hacked into Richard Horton's emails. Foster was arrested on 29 August 2012 on suspicion of hacking into Horton's emails. Discussed further in Heading 2, Chapter 6.

¹³³ (n 128) [2].

¹³⁴ *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943.

¹³⁵ *ibid* 948.

¹³⁶ *Totalise plc v The Motley Fool Ltd and another* [2001] EMLR 750; *Sheffield Wednesday Football Club Ltd and others v Hargreaves* [2007] EWHC 2375 (QB), [2007] All ER (D) 270 (Oct).

¹³⁷ *Applause Store Productions & Firshi v Raphael* [2008] EWHC 1781, [2008] All ER (D) 321 (Jul); *G & G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), [2009] All ER (D) 92 (Dec); *Lockton Companies International & Others v Persons Unknown and Google Inc* [2009] EWHC 3423 (QB).

¹³⁸ 'South Tyneside Council 'gets Twitter data' in blog case', (*BBC News*, 30 May 2011)

<<http://www.bbc.co.uk/news/uk-england-tyne-13588284>> accessed 30 May 2011.

¹³⁹ (App No 821/03) 15 December 2009.

Similarly, as in the case of the US, the courts will undertake a balancing exercise between the right under Article 10 to free expression and other rights arising from the Convention such as the right to privacy under Article 8, discussed in Chapters 5 and 6.

9. Concluding Remarks: Effectiveness of current approaches

The need for a sophisticated and effective strategy to adopt in targeting the root problem concerned with irresponsible content on new forms of media and platforms needs to be considered. A considerable number of states have for economic reasons permitted extensive ICT infrastructure building and increased technology permeation but employ a filtering system or monitoring regime. It appears that any repressive actions on the part of the state seem to invite reaction from the netizens. Any state action simply results in attracting greater attention to the source of the information. The reaction is seen at an individual level creating a type of “civil martyrdom” – the one-man revolution model; or the collective and organised model, involving international and national cooperation and solidarity. In the case of Malaysia, the defamation suits and detention orders have had no gagging effect and no reduction of interest in online social media activity.

The question that needs a review is whether social media and technology has played a significant role in achieving political change. The Malaysian case study has shown that the Internet has contributed to the democratic process and public sphere. The cyberutopic fantasy that technology is the engine of change has to, however, be qualified. The lesson quickly learnt by cyberlibertarians is that the engine for change cannot solely concentrate around the Internet or the blogosphere in order to enhance democratic practices. In the case of Iran during the Green Revolution, the Internet was reduced to functioning as an Intranet. Activists relied on text messaging seen to be far more effective as a method of spreading information or messages that do not require Internet permeation or access to proxy servers to get around government filters or monitoring. The most evident use of social media platforms such as *Facebook* and *Twitter* in facilitating democratic change came from the Arab Springtime Revolution of 2011. Citizen journalism on the Internet, when contributing to socio-political discussion which is in the public interest, results in the following – diversity of the sources of news; contribution to the marketplace of ideas; allowing individuals to provide insights not previously capable of being shared as effectively as in the present times owing to the technology; contribution to the national and

international conversation; mobilisation of the organisation of thought and action amongst citizens of the state or persons having similar interests; and in general, enhancing the right of individuals to speak, converse, debate and perhaps, act. These consequences, it must be stressed, do not replace the importance of the role the mainstream media has to execute as the Fourth Estate but instead complement this role. The degree to which citizen journalism on the Internet becomes relevant could be related to the extent the mainstream media discharges the said role. The role and function of citizen journalism is well worth a reflection in the context of filling the vacuum resulting from the failures and shortcomings of traditional mainstream media to engage with the public in its role as the Fourth Estate or putting in to practice public journalism. If the press and other media, are seen to be “speaking *for* the public”, then citizen journalists can be seen to be “speaking *as* the public”. Therefore, the need of the legislatures and governments to possess a deeper investigation and understanding of the phenomenon in order to respond effectively is essential.

Chapter 5

Rights and Responsibilities of the Media

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1. Introduction

The aim of this chapter is to enquire into several of the areas that accord journalists and media certain rights and privileges under the law as well as covering areas of accountability imposed by the law and professional codes. This analysis is essential before there can be a consideration of any extension or extrapolation of these rights to citizen journalists on the Internet.

The chapter begins by looking at several international conventions and documents before considering the current legal framework in the US, the UK and Malaysia. The starting point of the discussion on the current legal framework is the basis upon which the media rights are based – the freedoms of speech and expression – in the US, the UK and Malaysia. The chapter will first look at the constitutional framework in the UK, US and Malaysia and secondly at professional codes in these countries. When looking at the constitutional framework, the extent freedom of speech and expression is enshrined in the said framework will be considered, its extension to the media and a focus on three aspects that flow from this namely, reporter's privilege of confidentiality of sources, prior restraint and open justice.

These areas seem to be the most controversial as well as hard-won of rights by the press particularly in executing several essential functions such as investigative journalism in relation to democratic politics and upholding the rule of law. These media rights may go beyond those accorded to or possessed by any individual in order for the media to fulfil certain roles particularly ‘fulfilling certain public interest tasks, including those of investigation, criticism and standing up to pressure.’¹ Whilst there are rewards and incentives in carrying out such functions, there is also an expectation of accountability and responsibility. Responsibility can be termed as ‘any expectation from society of public benefit (or injunction to avoid harm).’² According to McQuail, this definition is ‘deliberately left open and refers to the relevant content of media responsibility (for instance, in respect of truthfulness, independence, fairness, decency, etc) and to questions regarding the source and strength of any obligation whether imposed or voluntarily accepted.’³ Responsibility that is imposed can be seen in the way the law sets out the parameters within which the media must function whereas responsibility that is voluntarily accepted can be seen in the form of professional codes. The chapter will conclude with whether these benefits and standards can be extended to citizen journalists on the Internet.

2. International Conventions

The right to free speech and expression has developed through the centuries and has now been enshrined in conventions and constitutions.

The idea of a right to freedom of expression is derived from the 17th and 18th century European Enlightenment which saw the struggle against the power of monarchist rulers. In the UK, the earliest source of protecting free speech was the Bill of Rights 1688, where Article 9 sets out that freedom of speech is essential to members of Parliament to speak and debate freely in Parliament. The clause reads:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

¹ Denis McQuail, *Media Accountability and Freedom of Publication* (OUP 2003) 170.

² A working definition set out by McQuail.

³ *ibid.*

France's Declaration of the Rights of Man and of the Citizen in Article 11 provides that:

The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly speak, write and print with freedom.⁴

In the First Amendment of the US Constitution, it is provided that:

Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁵

The international authority for the freedom of speech and expression is Article 19 of the Universal Declaration of Human Rights.⁶ Although the declaration is not an international treaty, nevertheless, Article 19 provides an international reference for media law and ethics to build on. Article 19 of the Declaration reads:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This right is reiterated but qualified in Part III Article 19 of the International Covenant on Civil and Political Rights⁷ with the main addition being the proviso in Clause 3 of the said Article.⁸ As the covenant is a binding treaty, the inclusion of permitted limits on the rights is highly relevant. The Article reads:

1. Everyone shall have the right to hold opinions without interference.

⁴ National Assembly of France 1789.

⁵ Bill of Rights 1791.

⁶ Adopted 10 December 1948 by the General Assembly of the United Nations. The declaration is not a treaty but it is considered as customary international law.

⁷ Adopted 16 December 1966 by General Assembly resolution, entered into force 23 March 1976.

⁸ The qualification in Clause 3 proviso will be considered in evaluating the responsibilities imposed in media in this Chapter and Chapter 5.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. [Emphasis added]

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

*(b) For the protection of national security or of public order, or of public health or morals.*⁹[Emphasis added]

Article 10 of the European Convention of Human Rights adopted by the Council of Europe, resembles Article 19 of the United Nations' Universal Declaration of Human Rights 1948, even more so Article 19 of the International Covenant on Civil and Political Rights. The provisions of the Convention were adopted by the UK in the Human Rights Act 1998 (hereinafter referred to as "HRA")¹⁰ with the various articles contained in Schedule 1 and are treated as constitutional principles.

Article 10(1) reads:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The article qualifies itself in clause 2 which reads:

⁹ Signed by the US and the UK. Unsigned by Malaysia.

¹⁰ Came into force 2 October 2000.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The extent of the adoption of Article 19 of the declaration or Article 19 of the covenant differs between states and this is evident when discussing this perspective between the US, UK and Malaysia.

3. The relationship between freedom of speech/expression and freedom of the press in general

The protection of free speech and speech by media varies amongst states.

Certain states exert control over dissemination of news and information and certain others encourage, within acceptable limits, the same. These are the polar extremes of the level of media and press freedom that exists. The relationship of the state and the press is two-dimensional – on one hand, the use of power to limit or suppress discussion to protect *inter alia* individual interests against untruthful, unjustifiable and intrusive publications and protection of the community and security;¹¹ and on the other hand, affirmative state initiatives to encourage communication of news and ideas and accessibility of information. Whichever the case, there is no denying the continued determination by states to rise up to the standards of Article 19 of the Universal Declaration of Human Rights 1948 either voluntarily or under the pressure of its increasingly informed, connected and educated citizenry.

Within states, the development of free speech, in general and in terms of the press, depends on the importance given to constitutional provisions and to the importance of the role of

¹¹ Similar to the proviso in Article 19.

the mass media¹² in promoting these freedoms. These freedoms which were propounded to guarantee freedom of individuals were extended to the mass media in view of the role played by the media in public discourse.¹³ In reference to the extension of this freedom to the media, Barendt¹⁴ comments that in view of the media providing readers, listeners and viewers with information, it facilitates the active participation in political democracy, playing the vital role as the 'public watchdog'¹⁵ and the 'eyes and ears of the general public'.¹⁶

4. Freedom of speech and freedom of the press in the US

4.1 The purpose of the First Amendment protection

In the US, the First Amendment to the Bill of Rights protects freedom of speech as the most fundamental of all rights. The First Amendment forbids Congress to make laws 'abridging the freedom of speech, or of the press'.

The rich heritage that has given the First Amendment its voice in the writings of Locke, Paine, Bentham and Mill is seen in the way this heritage has provided the US press and the media in general, its freedom. Rich summarised this:

Underlying these First Amendment guarantees is the belief that the key to effective government is an informed citizenry, one that is not told by the government what is right, but instead makes those determinations itself, through its own education. Armed with the knowledge provided to them in a free 'marketplace of ideas', these citizens elect officials who, with the citizens' informed consent, steer the government on its proper course.¹⁷

The marketplace theory, discussed in Chapter 2, became the soap-box for judges and legal scholars upon which to build democratic participation in effective government whereby

¹² Freedom of the press amounts to freedom of 'the media' and the term 'press' and 'media' are used interchangeably. Melville B Nimmer, 'Introduction – Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?' (1974-1975) 26 Hastings LJ 639; See also *Gertz v. Robert Welch, Inc.* 418 US 323 (1974); *United States v Paramount Pictures, Inc.* 334 US 131 (1948) 166.

¹³ Chapter 2.

¹⁴ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 417-8.

¹⁵ Borrowing the phrase from the decision in *Observer and Guardian v UK* (1992) 14 EHRR 153 [59].

¹⁶ Phrase used by Sir John Donaldson MR in *AG v Guardian Newspapers Ltd* (No.2) [1990] 1 AC 109 (CA) 183.

¹⁷ R Bruce Rich, 'The United States of America' in Nick Braithwaite (ed), *The International Libel Handbook* (Butterworth-Heinemann 1995), 1.

citizens who engage in this participation need to be informed. It is precisely this positioning that has given the press a preferred constitutional position in the context of the First Amendment.

Barron¹⁸ when writing on the First Amendment and access to the press commented that “little attention” has been paid to the definition of the purposes the said amendment seeks to achieve. He directs us to the opinion of Justice Brandeis in *Whitney v California*¹⁹ and Justice Murphy in *Thornhill v Alabama*²⁰. Barron summarizes Brandeis’s concurring opinion as follows:

...that underlying the first amendment guarantee is the assumption that free expression is indispensable to the ‘discovery and spread of political truth’ and that the ‘greatest menace to freedom is an inert people.’²¹

In *Thornhill v Alabama*, Justice Murphy emphasized the importance of ‘the public need for information and education with respect to the significant issues of the times.’ Therefore, political speech is one of the types of speech that is at the forefront of protection of the First Amendment right. As recent as in the case Supreme Court decision in *Citizens United v Federal Election Commission*, the court stated that political speech is ‘speech that is central to the First Amendment’s meaning and purpose.’²² However, the Supreme Court has held that protection could be restricted where there is “imminent lawless action” or speech that was likely to produce such action,²³ or if the speech presented “a clear and present danger” that will bring about imminent danger and substantive evil to the state.²⁴

Barron also highlights the further purpose of the First Amendment in providing protection of the right of access to the mass media – the “public order function”²⁵ relying on Justice Cardozo in *Palko v Connecticut*²⁶ and Justice Brandeis in *Whitney v California* who both

¹⁸ Jerome A Barron, ‘Access to the Press – A New First Amendment Right’ (1967) 80 Harvard L R 1641, 1648

¹⁹ 274 US 357 (1927) 375.

²⁰ 310 US 88 (1940) 102.

²¹ (n 18).

²² 558 US 50 (2010).

²³ *Brandenburg v Ohio* 395 US 444 (1969) 447.

²⁴ *Schenck v United States*, 249 US 47 (1919) 52.

²⁵ (n 18) 1650.

²⁶ 302 US 319, 327 (1937).

emphasized the importance of the opportunity to communicate ideas.²⁷ Justice Cardozo in *Palko* made reference to the freedom of thought and speech as ‘the matrix, the indispensable condition of nearly every other form of freedom.’²⁸ Justice Brandeis stressed the dangers of suppressing speech:

‘...it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies...’²⁹

Mr Justice Brandeis in his concurring opinion in *Whitney v California*, reaffirmed the justifications for free speech as essential in allowing a citizenry to develop its faculties, that it is an end in itself as it is the secret of happiness, that ‘public discussion is a political duty’ and adds that freedom of speech is the ‘path to safety’ if there is an opportunity to discuss matters freely.³⁰

4.2 Freedom of speech *and/or* freedom of the press?

The wording of the First Amendment that speaks of the “freedom of speech” and “freedom of the press” has led to the discussion that there is a possible construction of a constitutional role for the press in addition to the freedom of speech being the right of individuals. Is freedom of press subsumed under freedom of speech or are they separate freedoms with differing scope? This analysis is essential in understanding the attitudes of the law whether through legislation or case law in determining the scope of privileges and rights enjoyed by the media. Which perspective will allow citizen journalism to flourish? Barendt proposes three perspectives on the relationship between the two freedoms.

²⁷ (n 18) 1650.

²⁸ (n 26).

²⁹ 274 US 357 (1927) 375.

³⁰ *ibid.*

4.2.1 The first perspective

The first perspective is that both the freedoms are equivalent. References are made to Dicey, the UK Court of Appeal decision in *AG v Guardian Newspapers Ltd*³¹ and the attitude of the US Supreme Court. Barendt³² comments that Dicey 'treated freedom of speech and liberty of the press as interchangeable terms.'³³ Dicey clarifies the English position:

Any man may, therefore, say or write whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement (either by word of mouth, in writing, or in print) which he is not legally entitled to make. Nor is the law of England specially favourable to free speech or to free writing in the rules which it maintains in theory and often enforces in fact as to the kind of statements which a man has a legal right to make. Above all, it recognises in general no special privilege on behalf of the "press," if by that term we mean, in conformity with ordinary language, periodical literature in general, and particularly the newspapers. In truth there is little in the statute-book which can be called a "press law."³⁴

And Dicey further emphasises this lack of distinction between the press and the writing of any other person:

Writers in the press are, in short, like every other person, subject to the law of the realm, and nothing else. Neither the government nor the Courts have (speaking generally) any greater power to prevent or oversee the publication of a newspaper than the writing and sending of a letter. Indeed, the simplest way of setting forth broadly the position of writers in the press is to say that they stand in substantially the same position as letterwriters.³⁵

³¹ [1990] 1 AC 109.

³² (n 14) 419.

³³ AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan 1959) ch. VI, The Right to Freedom of Discussion, 239.

³⁴ *ibid* 240.

³⁵ *ibid* 249.

Further, in *AG v Guardian Newspapers Ltd*, Sir John Donaldson expounded that the right of the media to know and to publish 'is neither more nor less than that of the general public.'³⁶ On the attitude of the US Supreme Court, Barendt forwards the view that the US Supreme Court has not accorded the First Amendment "freedom of the press" limb a distinct coverage over above the freedom of speech enjoyed by any other individual.³⁷ Barendt sees three advantages of this perspective – firstly, there will be no discrimination against individual speakers and writers if they are treated in the same way as the press or the media; secondly, "definitional" problems as to what may amount to "press" can be avoided if special press or media rights are not distinguished from general speech; and, finally, when any form of censorship-like mechanism is imposed such as a ban by government or damages ordered by the court against a media entity, both 'freedom of speech and media freedom is implicated'.³⁸ Van Alstyne equally affirms this advantage. He comments:

Rather let the free press draw strength from the specific and equal mention it receives in the first amendment ("equal" to the same mention made of free speech) to insure that it shares fully in the equal protection of that freedom of expression granted to each person who holds it, and who asserts it as *his own* right without pretence that he is the designated guardian of the people's right to know...That they are not constrained by standards not applicable to the lone pamphleteer or to the lone haranguer, however, is itself some of the best evidence that the first amendment is alive and well.³⁹

Nimmer quotes Professor Levy's writings and who Nimmer refers to as the 'foremost historian of the First Amendment' on this point.⁴⁰ Levy commented that '[m]ost writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press.'⁴¹ This usage was seen prior to and at the time of the adoption of the First Amendment. The duality was seen to

³⁶ (n 31) 183.

³⁷ (n 32).

³⁸ (n 14) 420.

³⁹ William Van Alstyne, 'The Hazards to the Press of Claiming a Preferred Position' (1977) 28 Hastings LJ 761, 769-770.

⁴⁰ (n 12) 640.

⁴¹ Leonard Levy, *Legacy of Suppression: freedom of speech and press in early American history* (The Belknap Press of Harvard University Press 1960) 174.

have arisen as a result of necessity in bringing about some clarity that “speech” applied not only to oral expression but also extended explicitly to written expression with the usage of the word “press” in reference to the printing press.

Barendt points out that this perspective is not free from criticism and he highlights two shortcomings. Firstly, if one is to take this perspective, ‘it does not add anything to freedom of speech’ even when there is a specific mention of it in the First Amendment; and secondly, the perspective does not lend credence to the constitutional role played by the press so as to entitle them to additional legal privileges such as the right to acquire information and attend public events – seen as opportunities or facilities for speech, which are not available to individuals.⁴² Value of the speech of citizen journalists on the Internet speaking on socio-political matters of public interest would merit the protection of the First Amendment but taking the view in this perspective would neutralise its importance and value as any other speech worthy of protection under the First Amendment and the argument that it should be cloaked as speech which functions in the same way as the press will not be able to be forwarded.

4.2.2 The second perspective

The second perspective that freedom of the press is a distinct freedom from freedom of speech is based on the rationale that the press carries out the function of checking on government. In support of this stand, Barendt refers to Supreme Court Justice Potter Stewart⁴³ who contends that the “free press” guarantee is a “structural provision” of the US Constitution.⁴⁴ Justice Stewart relies on Supreme Court cases⁴⁵ to support his contention such as where the privilege of a journalist to refuse disclosure confidential sources was lost only on a slim 5:4,⁴⁶ where the court refused to grant a restraining order against the *New York Times* and other newspapers from publishing the Pentagon Papers,⁴⁷ where the court declared a Florida statute as unconstitutional as it compelled newspapers to grant a “right of

⁴² (n 14) 420.

⁴³ Potter Stewart, ‘Or of the Press’ (1975) 26 Hastings L J 631.

⁴⁴ (n 43) 632.

⁴⁵ (n 43) 632-633.

⁴⁶ *Branzburg v Hayes* 408 US 665 (1972).

⁴⁷ *New York Times Co v United States* 403 US 713 (1971).

reply” to political candidates who they were critical of,⁴⁸ where the court ruled that political groups did not have a right of access to federally regulated media⁴⁹ and a series of decisions where the court ruled that a public figure could not sue a publisher for libel unless the claimant could prove that the publication was a malicious damaging untruth.⁵⁰ This contention is premised on Justice Stewart’s opinion that it would be a constitutional redundancy if the freedom of press was not treated distinctly from freedom of speech in view of the inclusion of both guarantees in the First Amendment.⁵¹ Justice Stewart comments that the primary purpose of the constitutional guarantee of a free press is ‘to create a fourth institution outside the Government as an additional check on the three official branches’ and that it would be a mistake to limit that the role of the press or which purpose the constitutional guarantee to merely being ‘a neutral form for debate, a ‘marketplace of ideas’ or ‘a kind of Hyde Park corner for the community.’⁵²

However, placing the press or media in this privileged position seems to suggest that traditional mainstream media have rights that may not be accessible to individual writers not employed by an institutionalized media entity. The mere fact that mainstream institutionalized media ‘may play a more substantial role than any particular individual in disseminating information and ideas to the public’ does not seem to correspond with the additional privileges that are conferred beyond the enjoyment of freedom of speech by others.⁵³ Further, Barendt points out that this distinct recognition under the second perspective may lead institutional media to act ‘in a manner prejudicial to free speech interests or values.’ Barendt provides examples where the pluralistic nature of information may be damaged through determination of content through ownership that influences editorial exercise.

Nimmer, who believe that this perspective is an idea whose time is past due, explores and questions the “duality” of the First Amendment whether there is some justification or

⁴⁸ *Miami Herald Publishing Co v Tornillo* 418 US 241 (1974).

⁴⁹ *Columbia Broadcasting System Inc v Democratic National Committee* 412 US 94 (1973).

⁵⁰ *Rosenbloom . Metromedia Inc* 403 US 29 (1971); *Curtis Publishing Co v Butts* 388 US 130 (1967); *New York Times Co v Sullivan* 376 US 254 (1964).

⁵¹ (n 43) 633-634.

⁵² (n 43) 634.

⁵³ (n 14) 421

rational for it, or, is it a “meaningless appendage”.⁵⁴ Nimmer proposes that there is no evidence in the debates of the First Amendment that suggests that there was a distinction in mind by the Founding Fathers. He suggests that the “duality” was necessary for the purposes of linguistic clarity, as discussed earlier, in Heading 4.2.1 *supra*, whereby ‘references to “speech” might be construed to protect only oral expression, so that the reference to “the press” was added in order explicitly to protect written expression’.⁵⁵

It is essential to understand the distinguishable impact between merely exercising one’s rights under a right to free speech from the right of the press to free speech. Clearly the dissemination of any information cannot be deemed to be an act in exercise of the right of the press. The amplification of speech by the press distinguishes it in the very least from any speech. Stewart J dissenting in *Branzburg v Hayes* commented that ‘the press enhance[s] personal fulfilment by providing the people with the widest possible range of fact and opinion’.⁵⁶ Two things are unquestionable – firstly, the democratic dialogue is enhanced by the function of the press in informing and opinion shaping, and, secondly, speech through the press makes a more significant contribution to the democratic dialogue than speech through non-media entities.⁵⁷ Perhaps it is these two things that may accord its special place in the “duality” argument.

The argument that the press could provide “personal fulfilment” is a dated one. In view of today’s sources of news, particularly online sources, individuals can have access to “the widest possible range of fact and opinion” that may not always be resourced from traditional media. The Internet allows a varied range of sources that are able to provide fact and opinion directly accessible to readers which may not be part of media entities. These may comprise of individuals who act as direct sources of information and news. Take for instance, individuals in conflict zones, natural disasters or members of a suppressed or terrorised group. Information and news can be channelled directly to readers without the need of media acting as the conduit.

⁵⁴ (n 40).

⁵⁵ *ibid.*

⁵⁶ (n 46) 726-727.

⁵⁷ (n 12) 653.

4.2.3 The third perspective

The third perspective forwarded by Barendt is where the protection is accorded only to 'the degree to which it promotes certain values at the core of our interest in freedom of expression generally'.⁵⁸ This perspective views freedom of the press as an instrument to promote values of freedom of speech such as pluralism in the sources of information in areas of public interest.⁵⁹

Barendt forwards two attractions for taking this perspective – firstly, it brings in line the role of the media in disseminating ideas and information to the public; and secondly, it does not draw a distinctive line between rights of institutional media and other individuals who may also provide information to the public on matters of public interest. This protection, however, requires some form of recognition either by the courts or the legislature.

The latter perspective by Barendt that no distinctive line is to be drawn between rights of media or other individuals appeals to the position of citizen journalists on the Internet. Any citizen journalists writing on the Internet on matters of public interest should be recognised as having a right to do so. It is not just *any and all* speech that is calling for the right to freedom of speech and expression – it is speech that has value in the socio-political discussion of several sections of society and must be in the public interest to warrant its publication.

4.3 Balancing exercise

Whichever perspective the courts may take, the courts face the added duty of having to undertake a balancing exercise in the event the right to free speech and expression comes in conflict with other rights. Even where the First Amendment is highly valued in the US in comparison with other states, the balancing exercise is necessary.

Any restraint on the freedom of speech is done through a process of balancing which involves weighing two conflicting interests – 'the government's concern about protecting a

⁵⁸ Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (CUP1990) 104.

⁵⁹ (n 14) 422.

particular interest, such as national security or individual reputation, against the speaker's or writer's (and society's) interests in expression.'⁶⁰

Professor Chaffee raises the difficulties of this balancing exercise:⁶¹

Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock...To find the boundary line of any right, we must get behind the rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interest, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about rights is that each side is so busy denying the other's claim to rights that it entirely overlooks the human desires and needs behind that claim.'

The drawback of this exercise is clearly that the outcome of the balancing turns on the facts of each case – what has come to be known as “ad hoc” balancing. Another balancing exercise quite different from balancing specific interests is “definitional” balancing where the protection of a particular type of speech is determined by the value of that speech. Consideration is given to protecting the values of that speech or category of speaker.⁶² Balancing decisions in this category are seen more favourably as they allow outcomes to be more predictable.⁶³

⁶⁰ Marc A Franklin, David A Anderson, Lyrrisa Barnett Lidsky, *Mass Media Law* (Thomson West 2005) 30.

⁶¹ Zechariah Chaffee Jr, *Free Speech in the United States* (Harvard University Press 1941) 31.

⁶² *ibid.*

⁶³ Melville B Nimmer, 'The Right to Speaker from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 Cal LR 935, 942-945; Gerlad Gunther, 'In Search of Judicial Quality on a Changing Court: The Case for Justice Powell (1972) 24 Stan LR 1001.

However, “definitional” balancing may deviate from the right to free speech being an individual’s right. Ingber articulates this concern:

Courts usually articulate constitutional rights as "individual rights" that are justified because of the protection they afford to the person exercising the right. But courts that invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit.⁶⁴

This concern is supported with reference to Mill:

Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.⁶⁵

Ingber states that Mill’s view is not a popular view held by the courts who focus ‘on the audience rather than the speaker relegate free expression to an instrumental value, a means toward some other goal, rather than a value unto itself. Once free expression is viewed solely as an instrumental value, however, it is easier to allow government regulation of speech if society as a whole "benefits" from a regulated system of expression.’⁶⁶

The balancing exercise is complex when there are layers of considerations to weigh up. When citizen journalists use the Internet to put their views to the world, their motives are manifold. Perhaps they do so because as individuals, they are exercising their constitutional right to free speech and expression as in the case of the US where the First Amendment right is entrenched and qualified in consideration of other competing interests (ad hoc balancing). Or perhaps owing to the knowledge they possess or the critique they hold or as a

⁶⁴ Stanley Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ (Feb 1984) 1984(1) Duke LJ 1, 4.

⁶⁵ John Stuart Mill, *On Liberty and Considerations on Representative Government* (R McCallum ed. 1948) 14-15.

⁶⁶ (n 64) 4-5. To lend support to his view, Ingber refers to Professor Laurence Tribe and Professor Emerson who both held that freedom of speech must be an “end in itself”, 4.

responsible citizen, they are in a position to use the Internet to put it across as categories of speakers who the law will protect; or perhaps the readers of this information have the right to discern the value and credibility of the speech by accepting or challenging the same with Web 2.0 technology which the law will accord protection on the basis of the marketplace theory (definitional balancing).

4.4 Areas of protection of the press and media under the First Amendment

In a select few areas, the press is given constitutional protection and privileges that are not available to other speakers. For instance, newspapers cannot be compelled to publish stories and journalists can discriminate against political candidates when reporting. Amongst these privileges, one that has received much controversial attention of the court is protection of confidential sources.

4.4.1 Reporter's privilege in refusal in revealing confidential sources

The press is seen as a constitutional actor that enjoys protection as an institution separate from the other free speech rights as endorsed by Justice Stewart, in that special rights followed the First Amendment's recognition of the press.⁶⁷ In his dissent in *Branzburg*, Justice Stewart stated that the rejection of this qualified privilege would 'undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.'⁶⁸ As suggested by Justice White in the majority view in *Branzburg*, the protection of reporter's privilege can only be established by legislatures.⁶⁹ Therefore, the implicit recognition of this qualified privilege status accorded by the law to the press can be seen in the protection of confidential sources provided for by state legislatures. More than 20 states provide protection of journalistic sources⁷⁰ with the State of Maryland being the first to enact a shield law in 1986. Several states have provided this protection on a constitutional basis.⁷¹

⁶⁷ (n 43).

⁶⁸ (n 46) 25. See importance of the dissent in *Branzburg* infra in the Heading.

⁶⁹ (n 46) 689.

⁷⁰ David Banisar, *Silencing Sources: An International Survey of Protections and threats to Journalists' Sources* (Privacy International 2008) 22-24.

⁷¹ The states are Arizona, California, Montana, Nebraska, New York, Oregon and Washington.

The underlying rationale for this privilege is set out by Justice Stewart:

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's...protection of a free press,...because the guarantee is "not for the benefit of the press so much as for the benefit of all of us."⁷²

Mr Justice Stewart also draws attention in his dissent to the importance of this right:

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality - the promise or understanding that names or certain aspects of communications will be kept off the record - is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power - the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process -- will either deter sources from divulging information or deter reporters from gathering and publishing information.⁷³

This privilege is a qualified one – balancing the right to confidential sources with other rights such as the protection of reputation, national security and investigation of crime.

In *Branzburg*, the majority of five Supreme Court justices ruled that journalists had no First Amendment protection against grand jury subpoenas. The four dissenting justices,⁷⁴ in *Branzburg*⁷⁵ set out conditions when revealing a source would be justified.⁷⁶ Firstly, 'only a compelling state interest in the regulation of a subject within the State's constitutional

⁷² (n 46) 725, 726.

⁷³ (n 46) 728.

⁷⁴ Justice Stewart with the second leading dissent (the first being Justice Douglas) with Justices Brennan and Marshall concurring.

⁷⁵ Stewart, Brennan and Marshall JJ.

⁷⁶ (n 46) 739, 740.

power to regulate can justify limiting First Amendment freedoms.’ and secondly, ‘it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.’

The justices further explained:

Thus, when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of "compelling and overriding importance" but it must also "convincingly" demonstrate that the investigation is "substantially related" to the information sought.

In order to satisfy this, the government must demonstrate first and foremost that ‘there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law’, second, ‘demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights’ and finally, ‘demonstrate a compelling and overriding interest in the information.’⁷⁷ These conditions demonstrate that the protection of confidentiality of sources is not an absolute or unquestionable right but one that can be challenged by the state.

The legacy of *Branzburg*’s minority decision is the beginning of the development of a “qualified privilege for newsmen”,⁷⁸ evident from the fact that by 2007, forty-nine states and the District of Columbia having introduced some form of protection for journalists by statute or case law.

4.4.2 “Open justice” Principle

Amongst the varied roles of the media in a democratic role is to keep the public informed, provide impartial reporting of events, act as the conduit for debate and discussion, and it

⁷⁷ (n 46) 743.

⁷⁸ James C Goodale, ‘*Branzburg v. Hayes* and the Developing Qualified Privilege for Newsmen’ (1975) 26 *Hasting LJ* 709, 709.

also has the added role of being the “surrogate” for the public in reporting court proceedings.

The right of the press to report on court proceedings hinges heavily on the importance of the “open justice” principle. The US Supreme Court, in the majority decision of Chief Justice Burger, quoted Jeremy Bentham as he ‘recognized the therapeutic value of open justice but regarded it as the keystone’⁷⁹ when he stated:

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance. 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827).⁸⁰

The First Amendment extension to the concept of ‘open justice’ principle brings into the discussion the Sixth Amendment which encapsulates the right to a fair trial in criminal prosecutions. The two amendments come into conflict if the reporting of court room events may prejudice the outcome of a trial.

The leading precedent of the US Supreme Court is the case of *Richmond Newspapers, Inc v Virginia*⁸¹ where Chief Justice Burger delivered the leading decision. The court dealt with the question whether there was the right of the public and the press to attend a criminal trial. The Chief Justice emphasised the role of the media and its presence in court as the ‘functioning as surrogates for the public’.⁸² The Chief Justice added:

While media representatives enjoy the same right of access to the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This “contribute[s] to public understanding of the rule of law and to comprehension of the

⁷⁹ Quoted in *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) 569.

⁸⁰ *ibid.*

⁸¹ 448 US 555 (1980).

⁸² *ibid* 573.

functioning of the entire criminal justice system...”⁸³...We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and “of the press could be eviscerated.”⁸⁴

Although the decision of the US Supreme Court in *Richmond* dealt with criminal proceedings, the decision has been held to be the precedent on the same issue of open justice in civil cases.⁸⁵

Whilst it is established that the principle of open justice applies to the press and members of the media, citizens sitting as observers in court proceedings are also reporting the proceedings on social media platforms. However, in cases where there are reporting restrictions, there is scepticism whether citizen journalists who are not professionals are trained in aspects of media law and court reporting. Needless to say that the issue of live-blogging or tweeting from the court room is still a controversial issue with members of the media much less citizen journalists. The decision to allow live-blogging or tweeting lies with the judge presiding over the matter where consideration turns on a case to case basis. In Massachusetts, the courts there are allowing citizen journalists to register with the courts and live-blog court proceedings. These are as a result of amendments made to the court rules effective from September 2012.⁸⁶ The amendments include a redefinition of the term “media” to include citizen journalists ‘who are regularly engaged in the reporting and publishing of news or information about matters of public interest,’ and permission of the judge, to use laptop computers, tablets, smartphones and other devices to cover the proceedings, including live-blogging. Reflecting on this type of forthcoming attitude towards citizen journalists is indicative of the recognition of their role in society in disseminating

⁸³ *Nebraska Press Association v Stuart* 427 US 539 (1976) 587.

⁸⁴ (n 82).

⁸⁵ See California Supreme Court decision in *NBC Subsidiary (KNBC-TV) Inc v Superior Court* 980 P 2d 337 (Cal 1999).

⁸⁶ Supreme Judicial Court Rule 1:19 <<http://www.mass.gov/courts/sjc/docs/final-sjc-rule-119.pdf>> accessed 20 September 2012.

information of public interest and their capability of “checking” that the judicial institutions and the judicial processes are open and transparent.

4.4.3 Prior restraint

The prior censorship by government of material is seen as controversial as it threatens the very essence of freedom of speech and expression.

Prior restraint is exercised in a limited manner in the US. Several but few forms of prior restraint are permitted. In the landmark US Supreme Court decision of *Near v Minnesota*,⁸⁷ the court held prior restraints as being generally improper. With a narrow decision of 5:4, the Supreme Court allowed the newspaper to continue publishing when a suit was brought against it under Minnesota state law to shut it down on the basis that it was a public nuisance as a result of news articles published critical of public officials. Having traced the history of prior restraint, the court arrived at the conclusion that the censorship of a newspaper is only warranted in very exceptional circumstances.

Chief Justice Charles Evans Hughes commented:

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional rights. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.⁸⁸

The Chief Justice held that prior restraints may be possible in exceptional circumstances such as the interest of national security, to control obscenity and incitements to acts of violence.⁸⁹ The debate on use of prior restraint was addressed 40 years later in the case that has come to be infamously known as the “Pentagon papers” case.⁹⁰ Although the majority of

⁸⁷ 283 US 697 (1931).

⁸⁸ *ibid* 718.

⁸⁹ (n 87) 716.

⁹⁰ (n 47) 713.

the court cited the government's failure of making a sufficiently strong case to justify prior restraint for the sake of national security, the analysis of the decisions of the individual justices who held in the majority proved that the majority did not provide a firm and decisive case for the press. In a 6:3 decision, five justices either favoured censorship or thought criminal sanctions would follow the publication of secret documents. Amongst the six justices – Black, Douglas, Brennan, Stewart, White and Marshall – only Justice Black was completely against any form of prior restraint. The five remaining justices felt as follows - Justice Douglas, although concurring with Justice Black, indicated in his footnotes that criminal sanctions could not follow as the government documents published were no longer secret suggesting therefore that if it were, criminal sanctions could possibly be upheld;⁹¹ Justice Brennan qualified by holding that prior restraints could be exercised in times of war;⁹² in the case of Justice Stewart, restraint was required in maintaining confidentiality and secrecy in the fields of international diplomacy and relations and national defense;⁹³ Justice White that criminal convictions could be sought under the Criminal Code for the publication of information relating to national defence instead of the imposition of prior restraint;⁹⁴ and according to Justice Marshall's judgment, prior restraint could be justified if the publication of the material could be damaging to national security.⁹⁵ The injunction sought by the US government against publication of the Pentagon Papers was denied.

The general position of the Supreme Court against prior restraint was summarised by the court in *Nebraska Press Association v. Stuart* which viewed prior restraints 'as most serious and least tolerable infringement on First Amendment rights', and added that:

A prior restraint,...by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time. The damage

⁹¹ (n 47) 724.

⁹² (n 47) 726.

⁹³ (n 47) 728-729.

⁹⁴ (n 47) 737.

⁹⁵ (n 47) 742.

can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.⁹⁶

The strong sentiments of the Supreme Court echoed in *Vance v. Universal Amusement Co.*:

...the presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* [emphasis in original] they break the law than to throttle them and all others beforehand.⁹⁷

Restraint of news and information in extremely compelling circumstances is allowed if deemed unacceptable and where strong justification on the part of the government can be established such as if irreparable harm to national security would be a direct result of the publication of the information. The strict and exceptional limitations when prior restraint can be exercised are essential in a democratic society. It would be challenging for the government to exercise prior restraint on social media activity and citizen journalism given the deinstitutionalised nature of its actors in contrast to identifiable mainstream media. The way in which prior restraint can be exercised against social media activity will be discussed in Heading 5.6.3.

5. Freedom of speech and freedom of the press in the UK

5.1 Development of freedom of speech and expression

UK signed the European Convention of Human Rights⁹⁸ as member of the Council of Europe in 1950⁹⁹ and became subject to the jurisdiction of the ECtHR¹⁰⁰ (hereinafter referred to as “ECtHR”) in 1966 where the right of individual petition was allowed to bring a case to the

⁹⁶ 427 US 539 (1976) 559.

⁹⁷ 445 US 308 (1980) 316 (emphasis in original).

⁹⁸ The Convention’s formal title is “Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950”.

⁹⁹ The UK ratified the Convention on 8 March 1951.

¹⁰⁰ The court was constituted in 1959.

Strasbourg court. The Strasbourg court's jurisdiction is evoked under Article 34 of the European Convention, where 'any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.

Prior to the incorporation of the European Convention of Human Rights by virtue of the HRA 1998 into UK domestic law, the Bill of Rights 1688, Article 9, quoted earlier in the chapter, only speaks of freedom of speech being essential to members of Parliament to speak and debate freely in Parliament.

Protection of freedom of expression and speech of the individual or the press was left in the hands of Parliament and the courts – meaning freedom of speech existed where it was not limited or restricted by Parliament and the courts. Common law principles were developed by the courts but were nevertheless limited constitutionally by Parliament. This echoes Sir Robert Megarry's statement, inspired by Dicey, in *Malone v Metropolitan Police Commissioner* stating:

England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.¹⁰¹

The third Royal Commission on the Press reported on the need for and importance of press freedom and defined it as:

...that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest¹⁰² by publishing the facts and opinions without which a democratic electorate cannot make responsible judgments.¹⁰³

Subsequent to the coming into force of the HRA on 2 October 2000, the Convention became incorporated into UK domestic law. The HRA makes available a remedy in the UK courts for

¹⁰¹ [1979] Ch 344, 357.

¹⁰² A detailed discussion of this will be undertaken in Heading 5.5 and Chapter 6.

¹⁰³ Royal Commission on the Press (Cmnd 6810, 1977) [2.3].

the breach of the Convention rights without the need to go to the ECtHR. It should be made clear that the UK courts are required to take into account the jurisprudence of the ECtHR in cases concerning rights protected under the Convention and does not permit the courts to override clear statutory language.¹⁰⁴ The HRA adopts in Schedule 1 the Convention rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁵ The Convention right central to the discussion of the rights of media is Article 10(1) which is qualified by Article 10(2).

In considering which element is to prevail – whether freedom of speech or the interests of others - the UK courts have always undertaken a balancing exercise where each case is decided on its merits.

5.2 The purpose and scope of the convention right

In *Handyside v UK*, the ECtHR described freedom of expression as ‘one of the essential foundations of ... a [democratic] society, one of the basic conditions for its progress and for the development of every man’.¹⁰⁶ In relating it directly to the importance of the exercise of this expression by the media, the inspiring observation of Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd* requires notice:

In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be

¹⁰⁴ Section 2, Human Rights Act 1998.

¹⁰⁵ Adopted 4 November 1950, entered into force 3 September 1953.

¹⁰⁶ (1976) EHRR 737 [49].

free, active, professional and enquiring. For this reason, the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.¹⁰⁷

This type of protection extends to offensive and unpopular speech. This was reiterated by Sedley LJ in *Redmond-Bate v DPP*.¹⁰⁸

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear.

The types of expression that are broadly protected can fall into three categories – political, artistic and commercial expression. In the context of the research, the most relevant type is political expression which covers, in general, matters of general public interest.¹⁰⁹ In *Reynolds v Times Newspapers Ltd*, Lord Nicholls commented that political discussion should not be distinguished from 'other matters of serious public concern'.¹¹⁰ Greater protection has been accorded to political expression in contrast to the other types of expression although it has been commented that there is no 'express theoretical basis' for it.¹¹¹

In terms of journalistic freedom and determining the strength of protection to be attached to this freedom, the Strasbourg court has to consider the value of the speech in that 'the substance of the ideas and information expressed'¹¹² being made regardless of the tone and

¹⁰⁷ *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290-291.

¹⁰⁸ [2000] HRLR 249, 260. See also [1999] Crim LR 998, 7 BHRC 375.

¹⁰⁹ A detailed discussion of this will be undertaken in Heading 5.5 and Chapter 6.

¹¹⁰ [2001] 2 AC 127, 204; See discussion in Heading 5.5 in this Chapter.

¹¹¹ John Wadham, Helen Mountfield, Caoilfhionn Gallagher and Elizabeth Prochaska, *Blackstone's Guide to the Human Rights Act 1998* (5th edn, OUP 2009) Para 7.370, 235.

¹¹² Borrowing the phrase used by the court in *Stoll v Switzerland* (2008) 47 EHRR 59 [146]

style in that 'the form in which they are conveyed'.¹¹³ The court emphasised that 'freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that *offend, shock or disturb* the State or any section of the community'¹¹⁴ and that the Court '...is mindful of the fact that journalistic freedom also covers possible recourse to a *degree of exaggeration, or even provocation*.' [Emphasis added]¹¹⁵

There is also the need to take into account the perceived quality of the journalism and journalism ethics such as selective, sensational and scandalous reporting¹¹⁶ which has the potential to detract from the importance and seriousness of the information that Article 10 serves to protect.¹¹⁷

Whilst there is little scope under the proviso in Article 10(2) for a restriction to be imposed on political speech or on a debate of questions of public interest,¹¹⁸ the court has to consider a multitude of aspects before holding the right of the media to protection under Article 10 in a balancing exercise, discussed in Heading 5.4 *infra*.

5.3 Which perspective applies to the interpretation of Article 10

Barendt is of the view that the ECtHR may favour the third perspective.¹¹⁹ As discussed in Heading 4.2.3, the third perspective is where the protection of the speech is only accorded to the extent of values that are core to the interest in the freedom of expression generally. He comments that the Strasbourg court has not interpreted Article 10(1) to provide a separate guarantee for the press and media but it has emphasized the role of the media as a "public watchdog".¹²⁰ An illustration Barendt utilized to support this is his review of the decision of the court in *Jersild's* case.¹²¹ *Jersild* is an important illustration of where the

¹¹³ *ibid.*

¹¹⁴ (n 106) [49].

¹¹⁵ *Fressoz and Roire v France*, Application No. 29183/95 [45].

¹¹⁶ *Stoll v Switzerland* (2008) 47 EHRR 59 [147-149].

¹¹⁷ *ibid* [152].

¹¹⁸ *Wingrove v the United Kingdom* Application no 17419/90 (ECtHR, 25 November 1996) [58]; *Lingens v Austria* (1986) 8 EHRR 407 [42]; *Castells v Spain* (1992) 14 EHRR 445 [43]; *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843 [63]; *Stoll v Switzerland* (2008) 47 EHRR 59 [105].

¹¹⁹ (n 15) 424.

¹²⁰ *Observer and Guardian v UK* (1992) EHRR 153 [59].

¹²¹ *Jersild v Denmark* (1994) 19 EHRR 1.

Strasbourg court has had to weigh the importance of freedom of speech and the protection of society from the negative elements of the exercise of that free speech. In *Jersild*, the applicant interviewed a group of young people called the 'Greenjackets' who made derogatory and racist remarks about immigrants and ethnic groups in Denmark. The interview was later broadcast over radio. The European Court found that whilst Article 10 reiterates the importance of freedom of expression as an essential foundation of a democratic society and the important role the media has in disseminating information, it also emphasized the duties and responsibilities of the media.¹²²

Barendt commented that:

In *Jersild* the Court held it was an infringement of Article 10 to penalize a journalist for aiding the dissemination of racist speech by interviewing on television members of an extremist group; the interview was one means by which news was reported to the public. The decision does recognize a special reporting right for journalists, which might not be afforded, say, someone who gratuitously repeated the hate speech of others in the course of discussion in a bar or even at a formal meeting. But it is most unlikely the Court would allow a journalist a greater freedom than other members of the public to disseminate his own racist views through a newspaper column."¹²³

The court considered the unique point of the exercise of Article 10 by the journalist in this case in that he did not make the objectionable statements but disseminated them.¹²⁴ The court when considering whether it was necessary to do so, made reference to the case law relating to the role of the press as summarized by the court in *The Observer and Guardian v. the United Kingdom*.¹²⁵ The Court went on to state the relationship, limitation and scope of the press in relation to the freedom of expression:

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be

¹²² *ibid* [29]-[31].

¹²³ (n 14) 424.

¹²⁴ (n 121) [13].

¹²⁵ *ibid*; (n 120).

afforded to the press are of particular importance (ibid.). Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"... Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.¹²⁶

Other aspects the court considered were the consideration of the powerful impact of the medium as part of the duties and responsibilities of a journalist where audiovisual media have a more powerful impact than the print media as well as the variation that may occur in terms of the methods of objective and balanced reporting depending among other things on the media in question.¹²⁷ The court emphasized that Article 10 protected 'not only the substance of the ideas and information expressed, but also the form in which they are conveyed.'¹²⁸

This categorization of Barendt of Article 10 was confirmed in another European Court decision in *Bergens Tidende v Norway*:

Where, as in the present case, measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for.¹²⁹

Therefore, the development of jurisprudence is equally weighted when developing the right encapsulated in Article 10 along with the limitation of the said right.

¹²⁶ (n 120) [31].

¹²⁷ *ibid.*

¹²⁸ *ibid.*; see also *The Oberschlick v Austria* (1996) 21 EHRR 1 [57].

¹²⁹ (2001) 31 EHRR 16 [52].

At present, owing to the accessibility and availability of the technology, tied in with the exploration of the Internet as a platform for freedom of speech, citizen journalism on the Internet has the capability, as seen in Chapter 4, of acting in the role of the “public watchdog”. If the role is the basis for the emphasis for affording the press with the importance of being the conduit for imparting information and matters of public interest, then arguably, the same recognition could be extended to citizen journalists. With this recognition, the duty to act responsibly so as not to overstep the boundaries of the right to expression and speech, will be required of citizen journalists on the Internet. This discussion will be undertaken in Chapter 6.

5.4 Limitation of freedom of expression and the balancing exercise

Much of the discussion, and litigation, concerning Article 10 is the scope and extent of the proviso limiting the right to freedom of expression in Article 10(2). Although at one glance the exception to the right to freedom of expression seems wide, the ECtHR has developed a three-stage test in the *Sunday Times*¹³⁰ case in justifying any intervention with the said right. The court felt that they had to ‘examine in turn whether the interference in the present case was “prescribed by law”, whether it had an aim or aims that is or are legitimate under Article 10 (2) and whether it was “necessary in a democratic society” for the aforesaid aim or aims.’¹³¹

“Prescribed by law” covers statute and unwritten law clearly including common law. The court held that the two requirements that flow from the expression are:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the

¹³⁰ *Sunday Times v UK* (1979) 2 EHRR 245.

¹³¹ *ibid* [45].

consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.¹³²

Whether it had an aim or aims, that is or are, legitimate under Article 10 (2), the interference with freedom of expression can be made under the aims listed therein.

Whether it was "necessary in a democratic society" for the aforesaid aim or aims, the European Court referred to its judgement in *Handyside* where the court said that the word "necessary" was not synonymous with "indispensable", neither had it the flexibility of such expressions as "inadmissible", "ordinary", "useful", "reasonable" or "desirable", but it implied the existence of a "pressing social need".¹³³ The term "necessary in a democratic society" is 'applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.¹³⁴

Where the ECtHR has frequently upheld the hallmarks of a democratic society being pluralism, tolerance and broad-mindedness as set out in *Handyside*,¹³⁵ the principle of proportionality places an element of limiting the extent to which states may place restrictions on the freedom in Article 10. Hence, over and above examining whether there is a pressing social need for the restriction, the court also examines whether the measure is

¹³² (n 130) [49]. In relation to the case, In the context of English Law, the court was satisfied that these requirements of accessibility and foreseeability were adequately provided for by the "pressure principle" which is the principle that a deliberate attempt to influence the settlement of pending proceedings by bringing public pressure to bear on one of the parties constituted contempt was formulated with sufficient precision in English Law. On the question whether the "prejudgment principle", the principle that it was contempt to publish material which prejudged the issues raised in pending litigation, satisfied the requirements, the European Court found in the affirmative and held that the interference with the applicants' freedom of expression was "prescribed by law" within the meaning of Article 10 (2).

¹³³ *Handyside v UK* (1976) 1 EHRR 737, [48].

¹³⁴ (n 130) [65].

¹³⁵ (n 133) [49].

proportionate to its purpose. This is where the European Court went on to add one final point when it held that Article 10 (2) left “a margin of appreciation” to the states provided to ‘both to the domestic legislator ... and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force’, but it is not a power that is unlimited or the identical as regards each of the aims set out in Article 10(2).¹³⁶ When examining the restrictions imposed by domestic legislation or authorities, the margin of appreciation therefore is the extent or amount of policy freedom the Strasbourg Court may grant in varying degree.

The House of Lords, in the single opinion of the court delivered by Lord Bingham, in *Huang v Secretary of State for the Home Department* and *Kasimiri v Secretary of State for the Home Department*¹³⁷ in a case involving Article 8 of the Convention on the right to respect for private and family life which has a similar structure to Article 10 is seen as instructive on setting out the guidance on the principle of proportionality. This is firstly, the objective is sufficiently important to justify limiting a fundamental right; secondly, the means used to achieve that objective are rationally connected to it; thirdly, the means used to impair the right or freedom are no more than is necessary to accomplish that objective; and lastly, there is maintained a fair balance between the rights of individuals or groups and the interests of the community.¹³⁸ Lord Bingham described the occasion when a court is called upon to adjudicate on the question of proportionality as follows:

The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a

¹³⁶ (n 133) [59].

¹³⁷ [2007] UKHL 11, [19], [2007] 4 All ER 15, [19].

¹³⁸ The High Court in *R (on the application of British Broadcasting Corporation and another) v Secretary of State for Justice* [2012] EWHC 13 (Admin) [51] summarized Lord Bingham’s principles.

given subject matter and access to special sources of knowledge and advice.

That is how any rational judicial decision-maker is likely to proceed.¹³⁹

In the balancing exercise between competing rights, much of this takes place when there is a clash between the press's right to freedom of expression under Article 10(1) and the individual's right to private life under Article 8. This clash arises when newspapers or the media publish news or information revealing the details of events, photographs, correspondences and phone conversations of the private lives of individuals, often celebrities and politicians. A distinction is made by the ECtHR between persons who have placed themselves in the public eye such as politicians and celebrities and private individuals who have not done so.¹⁴⁰ The courts have had to consider whether the right of the individual to respect for private life under Article 8 outweighed the right of the newspaper to freedom of expression under Article 10.¹⁴¹

Before holding the media accountable for infringing the rights of private individuals, the courts in the UK will have to satisfy a 2-step test established in *Campbell v MGN Ltd*.¹⁴² The first step is to pose the question whether the information is private in that did the person have a reasonable expectation of privacy? If the answer is in the affirmative, the second step is to undertake a balancing exercise by weighing the two rights - the Article 8 right of the owner to private life and the Article 10 right of the publisher to freedom of expression.

Further, the courts have an additional consideration of "public interest" to take into account in granting relief in proceedings other than criminal proceedings¹⁴³ that may affect the

¹³⁹ *Huang v Secretary of State for the Home Department; Kasmiri v Secretary of State for the Home Department* [2007] UKHL 11, [16]; [2007] 4 All ER 15, [16].

¹⁴⁰ Contrast *Lingens v Austria* (1986) 8 EHRR 407 [42] with *Von Hannover v Germany* (2004) 40 EHRR 1; *Peck v United Kingdom* (2003) 36 EHRR 31. In *Lingens*, at p 419, the court stated: "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt article 10(2) enables the reputation of others--that is to say, of all individuals--to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

¹⁴¹ *Campbell v MGN Ltd* [2004] UKHL 22, *Douglas v Hello! Ltd (No.5)* [2003] EMLR 31.

¹⁴² [2004] UKHL 22.

¹⁴³ Section 12(5) HRA.

application and exercise of the right to freedom of expression under Article 10(1). Section 12 of the HRA 1998 under the heading “Freedom of Expression” provides in subsection 4:

The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

Considerations in Section 12(4) paragraph (a) seem to be vital in cases concerning breaches of confidence where there has been unauthorised use and publication of confidential information.¹⁴⁴ The law of breach of confidence comes very close to Article 8. There is post-HRA analysis that consideration of Articles 8 and 10 is required in a claim for breach of confidence.¹⁴⁵ Lord Woolf CJ in *A v B* acknowledged that the law of breach of confidence has been expanded as a result of this consideration, stating that these rights could be upheld ‘by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence’.¹⁴⁶ The claim for breach of confidence was seen as a “vehicle” for upholding convention rights by the Court of Appeal in *Douglas*.¹⁴⁷ The impact of these pronouncements results in a modification of the law of breach of confidence and has been, as per Eady J, ‘extended under the stimulus of the Human Rights Act’.¹⁴⁸

In view of the extensive jurisprudence the courts have established whether in Strasbourg or in the UK, each outcome turns on a multitude of factors subjective to each case, making each exercise of balancing between interests or between the convention and legislation a complex endeavour.

¹⁴⁴ Further discussion in Heading 5.6.3 in relation to prior restraint and super-injunctions.

¹⁴⁵ Rebecca Moosavian, ‘Charting the journey from confidence to the new methodology’ (2012) 34(5) EIPR 324.

¹⁴⁶ *A v B* [2002] EWCA Civ 337; [2003] Q.B. 195 at [4].

¹⁴⁷ *Douglas v Hello! (No.3)* [2005] EWCA Civ 595; [2005] 4 All E.R. 128 at [53].

¹⁴⁸ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] E.M.L.R. 20 at [7].

5.5 Public interest, responsible journalism and *Reynolds*

One of the characteristics of protected speech under Article 10 is speech made in the public interest. Requirement of public interest is essential in a number of areas such as successfully raising the defences of fair comment and qualified privilege against a claim in defamation, in upholding open justice and prior restraint, discussed in Heading 5.6 *infra*, and generally, the right of the press to obtain and receive information and/or impart information. The standard of public interest in these areas differs where the element of public interest in the defence of fair comment is much less exacting in comparison to the defence of qualified privilege.

In recent years, the judgments of the House of Lords in *Reynolds*¹⁴⁹ and later *Jameel*¹⁵⁰ have provided a basis upon which such rights can be determined. Both cases dealt with the media relying on the defence of qualified privilege. In order for the defence to succeed, the element of public interest must exist in the information published. These decisions also echo the need for the standards of responsible journalism to be met before the law will accord any protection.

The principles espoused in the protection of traditional media in these judgments are laid out in broad terms – discussed in Heading 5.5.3 *infra* – and therefore provide a starting point for the protection of speech by citizen journalists on the Internet similar to that enjoyed by traditional media. Extending the reasoning in these judgments to social media platforms when citizen journalists are performing a function similar to that of traditional media, is essential in ensuring the right type of speech is protected. The information on social media platforms varies from the truthful and democratically engaging to the false, distorted, inaccurate, questionable, harmful and nefarious. Therefore, benchmarks such as public interest and test of responsible journalism act as measurements in ensuring that there could be a strong case for protection of socio-political discussion by citizen journalists as that accorded to traditional mainstream media.

¹⁴⁹ *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127.

¹⁵⁰ *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44, [2006] 4 All ER 1279, [2007] 1 AC 359, [2006] 3 WLR 642.

5.5.1 Public interest

According to Feintuck, the concept of “public interest” could assist in identifying ‘a meaningful overarching rationale for regulation of the media.’¹⁵¹ Why is the exploration of the nature of “public interest” important on what media does? McQuail suggests that it is possibly because the media serves a ‘purpose’ and in searching media responsibilities and questions of media accountability, it is one of the value judgments that have to be made about the media.¹⁵²

The media is traditionally seen as playing a multifarious role in society. Apart from keeping citizens informed, the media is also seen as an informal educator and social integrator. It does the latter by providing a space for public dialogue.¹⁵³ The recognition that the civic role of the media in informing and educating citizens is a role to be carried out is firmly seen in the print media in its codes. The preamble of the code of ethics for the US Society of Professional Journalists¹⁵⁴ and similarly in the preamble and Article 1 of the Statement of Principles of the American Society of Newspaper Editors¹⁵⁵ echoes this sentiment.

The expectation that the media serves the public interest in a democratic society is tied in with this role and the relationship the media has with the public. The term is used in relation to activities of the media such as privacy intrusions and to its relationship with the state. The UK’s Press Complaints Commission’s Editor’s Code of Practice¹⁵⁶ expressly adds that there may be exceptions to certain areas prohibited by its codes where public interest may prevail. It sets out what public interest includes but is not confined to:

- i) Detecting or exposing crime or serious impropriety.
- ii) Protecting public health and safety.

¹⁵¹ Mike Feintuck, *Media Regulation, Public Interest and the Law* (Edinburgh University Press 1999) 57.

¹⁵² (n 1) 46.

¹⁵³ David Croteau and William Hoynes, *The Business of Media: Corporate Media and the Public Interest* (2nd edn, Pine Forge Press 2006) 30.

¹⁵⁴ SPJ Code of Ethics, *Society of Professional Journalists* <<http://www.spj.org/ethicscode.asp>> accessed 21 July 2012.

¹⁵⁵ Statement of Principles, *American Society of Newspaper Editors* <<http://cw.routledge.com/textbooks/9780805850673/resources/Appendix%20C.pdf>> accessed 17 September 2012.

¹⁵⁶ Editors’ Code of Practice, *Press Complaints Commission* <<http://www.pcc.org.uk/cop/practice.html>> accessed 21 July 2012.

- iii) Preventing the public from being misled by an action or statement of an individual or organisation.

The Code spells out and emphasizes that '[t]here is a public interest in freedom of expression itself.'¹⁵⁷

The difficulty with "public interest" is in defining it, in deciding the level of its provision and whether it is a priority. Perhaps one way of understanding "public interest" is considering the underlying values it promotes such as the concept of community, general welfare, some kind of pursuit of common interest or even associated with citizenship and active participation of citizens in society. These underlying values appear to draw in the media and its role in society. The basic understanding of the phrase by inverting it – that the public interest becomes what the public is interested in – is not helpful as seen from the following discussion. Without defining it, McQuail relates "public interest", although accepting of the fact that it remains 'both vague and contentious', to 'the complex of supposed informational, cultural and social benefits to the wider society which go beyond the immediate, particular and individual interests of those who communicate in public communication, whether as senders or receivers'.¹⁵⁸ In a later attempt, McQuail defines public interest:

The concept of public interest is both simple and also very contested in social and political theory. As applied to the mass media, its simple meaning is that they carry out a number of important, even essential, informational and cultural tasks and it is in the general interest (or good of the majority) that these are carried out well and according to principles of efficiency, justice, fairness, and respect for current social and cultural values. At the minimum we can say that it is in the public interest that the media should do no harm, but the notion entails many positive expectations as well as restrictions and forms of accountability.¹⁵⁹

¹⁵⁷ *ibid.*

¹⁵⁸ Denis McQuail, *Media Performance: Mass Communication and the Public Interest* (SAGE 1992) 3.

¹⁵⁹ (n 1) 47.

Evident in McQuail exposition is the fact that acting in the public interest is a qualified action – subjected to a set of restrictions and principles of responsibility and accountability.

There is a valid reason for the lack of definition and this is confirmed by Feintuck when he says that 'definitional problems appear to be major obstacles to the development of a meaningful construct of the public interest, though even where attempts have been made to define the concept, they tend to incorporate rather than resolve tensions between competing versions of it.'¹⁶⁰

Returning to the basic understanding of "public interest", the question is - is everything the public is interested in, in its interest? Hence, the distinction to be made is between speech which is in the public interest and speech the public is interested in.

Kieran *et al* reminds us 'so far as the public is concerned, there is no universal right to know, and that journalists ought to understand, in each case of reporting, the emergent "status rules" that govern audience response to the news.'¹⁶¹

Review of codes of practice of journalists' bodies, undertaken by Morrison and Svennevig, evidenced that the common defence offered for cases involving intrusions of privacy was the reliance on public interest, whilst no definition was proffered in these codes.¹⁶² The authors set out however, what public interest may represent:

The key point to stress is that what is considered to be in the public interest represents a document of the values of any particular society. The public interest, constructed from the values people hold and wish to be upheld, means that the intrusion of privacy is not always authorized on what might be considered 'technical' considerations of material damage to the community,

¹⁶⁰ (n 151) 58.

¹⁶¹ Matthew Kieran, David E Morrison and Michael Svennevig (2000) 'Privacy, the Public and Journalism: Towards an Analytical Framework' (2000) 1(2) *Journalism: Theory, Practice and Criticism* 145.

¹⁶² David E Morrison and Michael Svennevig, 'The defence of public interest and the intrusion of privacy: Journalists and the public' (2007) 8 *Journalism* 44, 45.

but rather, in a Durkheimian sense of social solidarity, on the moral implications of acts.¹⁶³

In a sense, public interest could be tied up with news values. According to Galtung and Ruge, news values for instance, in the area of foreign news are topics, issues and concerns which the public are interested in.¹⁶⁴ The conclusion drawn by Morrison and Svennevig is 'that which the public is interested in forms news value, but not all news values are in the public interest and that which is in the public interest, whilst perhaps having news value attached to it, is not necessarily material which the public is interested in.'¹⁶⁵

Does the law provide for a helpful parameter? One of the fundamental areas where the debate of what is in the public interest frequently raises questions is in the area of media intrusions into the privacy of individuals in particular the question when such intrusions are unwarranted¹⁶⁶ or when they are legitimate when investigative journalists are acting in the public interest.¹⁶⁷ The discussion of what is public interest is a relevant factor for consideration by the courts when determining the granting of an interim or final injunction in restraining the media from publishing private information such as the publication of names of parties and/or the subject matter of the claim. The restraint which is argued to be necessary under Article 8 is weighted against the determination whether there was sufficient general public interest in publishing a news report of the proceedings revealing the identity of the party or parties and details of the proceedings to justify any curtailment of Article 8 in favour of Article 10.¹⁶⁸

Lord Hoffman spoke of the public interest in the publication of personal information of others in the *Campbell's* cases where His Lordship opined that the status of a person being a celebrity does not justify publication:

¹⁶³ *ibid* 45.

¹⁶⁴ Johan Galtung and Mari H Ruge, 'The Structure of Foreign News: The Presentation of the Congo, Cuba and Cyprus Crisis in Four Foreign Newspapers' (1965) 1 *Journal of International Peace Research* 64, quoted in (n 162) 49.

¹⁶⁵ (n 162) 49.

¹⁶⁶ *Campbell v MGN Ltd* [2004] UKHL 22 ; *Von Hannover v Germany* (2004) 40 EHRR 1; *Peck v United Kingdom* (2003) 36 EHRR 31; *Murray v Express Newspapers Plc* [2009] Ch 481

¹⁶⁷ See *Mosley v News Group Newspapers Ltd* [2008] EMLR 20

¹⁶⁸ Recently considered by the Court of Appeal in *JIH v News Group Newspapers Ltds* [2011] EWCA Civ 42, in particular the judgment by Lord Neuberger MR.

A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters.¹⁶⁹

Lady Hale in *Jameel* expands on the above:

There must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information that interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.¹⁷⁰

Similarly, in *Jameel*, Lord Bingham reiterated that 'it has been repeatedly and rightly said that what engages the interest of the public may not be material that engages the public interest.'¹⁷¹

The courts too can be divided on whether publications serve the public interest. If at the Court of Appeal in *A v B plc*¹⁷² Lord Woolf CJ's refusal to ban publication of stories involving a married professional footballer's extramarital sexual relations turned on the basis that he was a role model for the young, in *Campbell's* case at the Court of Appeal, Lord Phillips felt differently:¹⁷³

The fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay.

¹⁶⁹ *Campbell v MGN Ltd* [2004] 2 AC 457, [57].

¹⁷⁰ (n 150) [147].

¹⁷¹ (n 150) [31].

¹⁷² (n 146) [11].

¹⁷³ [2003] QB 633, [41].

The law has attempted to set out when public interest is to prevail over the protection of reputation of individuals but the nature of the interests are such that each case turns on its facts and drawing the defined legal boundaries of what lies in the public interest is implausible.

When journalists and media rely on the defence of fair comment against a defamation suit and the defence of qualified privilege which is rooted in public policy, the element of public interest needs to be the basis of publication.

5.5.2 Defence of Fair Comment

In raising the defence of fair comment in order to defeat a defamatory suit, public interest is categorized as one of the established five 'non-controversial matters' as set out by Lord Nicholls of Birkenhead sitting in the Court of Final Appeal of Hong Kong in *Cheng Albert v Tse Wai Chun Paul*.¹⁷⁴ The first matter of the five matters pertaining to public interest is set out below:

First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in [*London Artists Ltd v Littler* [1969] 2 All ER 193 at 198, [1969] 2 QB 375 at 391].

On the point of the fourth matter - motive - elements of public interest are reiterated. However, His Lordship's pronouncement does not add any erudition to the meaning of public interest:¹⁷⁵

Proof of malice is the means whereby a plaintiff can defeat a defence of fair comment where a defendant is abusing the defence. Abuse consists of using the defence for a purpose other than that for which it exists. The purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting on matters of public interest. This accords with the constitutional guarantee of freedom of expression. And it is in the public interest that everyone should be free to express his own, honestly held views

¹⁷⁴ (2000) 10 BHRC 525, 529; [2001] EMLR 777, [16]-[21].

¹⁷⁵ *ibid* [41].

on such matters, subject always to the safeguards provided by the objective limits mentioned above. These safeguards ensure that defamatory comments can be seen for what they are, namely, comments as distinct from statements of fact. *They also ensure that those reading the comments have the material enabling them to make up their own minds on whether they agree or disagree.*¹⁷⁶

The observation made by Lord Phillips in *Joseph and others v Spiller and another*¹⁷⁶ in reference to Lord Nicholls judgment was that it ‘broke new ground in holding that malice in the context of fair comment had a different meaning from malice in the context of qualified privilege. In the former context, the motive for making the comment was irrelevant. All that mattered was whether or not the commentator honestly believed in the truth of his comment.’ Lord Phillips added that this was an evolution of the view that Lord Nicholls had expressed in *Reynolds v Times Newspapers Ltd* where Lord Nicholls commented that:

Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth.¹⁷⁷

The Strasbourg jurisprudence also needs to be considered in the context of Article 10 of the European Convention of Human Rights where the balancing between Articles 8 and 10 has resulted in conflicting outcomes.¹⁷⁸ The test of proportionality adopted at the Strasbourg court to achieve the balance is essential to the thesis.¹⁷⁹ The importance of public interest in this balancing is central where the subject of a publication is one of public interest. There have been decisions of the Strasbourg court where the court has clearly reiterated its stand that the qualification of Article 10 speech has to be minimal in areas of political speech or when debating questions of public interest.¹⁸⁰

¹⁷⁶ [2011] All ER 947, 952.

¹⁷⁷ [1999] 4 All ER 609, 622; [2001] 2 AC 127, 201.

¹⁷⁸ *Karako v Hungary* [2009] ECHR 39311/05; *Pfeifer v Austria* (2009) 48 EHRR 175, [2007] ECHR 12556/03.

¹⁷⁹ Cases such as *Sorguc v Turkey* [2009] ECHR 17089/03 given 23 June 2009, *Jerusalem v Austria* (2001) 37 EHRR 567, [2001] ECHR 26958/95, *Lindon v France* (2007) 46 EHRR 761, [2007] ECHR 21279/02, *Nilsen v Norway* (1999) 30 EHRR 878, [1999] ECHR 23118/93 will be discussed in Chapter 3.

¹⁸⁰ *Sürek v. Turkey (No. 1)* [GC], no. 26682/95 [61]; ECHR 1999-IV; *Hrico v Slovakia* (2004) 41 EHRR 300 [40], [2004] ECHR 49418/99; *Feldek v. Slovakia*, no. 29032/95, [74]; *Vajnai v. Hungary*, no. 33629/06 [47]; *Wingrove v. The United Kingdom* no:17419/90, 24 EHRR [58].

5.5.3 Defence of Qualified Privilege and the impact from *Reynolds* and *Jameel*

An essential case when setting out the legal parameter of this defence is set out in the landmark House of Lords case of *Reynolds*.¹⁸¹ The fundamentals of the defence was laid down more than a century before *Reynolds*. Lord Shaw of Dunfermline in *Adam v Ward*¹⁸² referred to the judgment of Willes J in *Henwood v Harrison*¹⁸³ as ‘most valuable’ where the judgment laid down the fundamentals of the defence of qualified privilege as follows:

The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals.

Similarly, Bankes LJ set out in *Gerhold v Baker*¹⁸⁴:

It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in protection of some [self or] common interest.

In *Reynolds*, the defendant newspaper claimed for the defence of qualified privilege in particular seeking an incremental development in the common law standard in favour of a subject of publication in the form of political information. The House of Lords rejected the claim holding that there was a need to provide adequate protection for reputation and that it would be an “unsound” principle to distinguish political discussion and information from other matters of equal public importance and concern. This led Lord Nicholls to develop the 10 indicia-test as a way of considering all circumstances of the publication as well as the

¹⁸¹ (n 150).

¹⁸² [1917] AC 309, 349; [1916-17] All ER Rep 157,175.

¹⁸³ (1872) LR 7 CP 606, 662.

¹⁸⁴ [1918] WN 368, 369.

duty-interest test in determining which fundamental right prevails when freedom of expression interacts with protection of reputation. The court recognized that the exception to the protection of reputation prevailing over freedom of expression is in defence of a comment on a matter of public interest which, although available to anyone, has particular importance to the media. The question is whether protection of reputation must give way to a higher priority in the wider public interest.¹⁸⁵ The court recognized the difficulty in defining “public interest” in that no court has defined it except to say that it should not be confined within narrow limits.¹⁸⁶ Lord Nicholls set out the circumstances when a comment which is the subject matter of a publication of public concern may enjoy qualified privilege in the form of 10 non-exhaustive indicators.¹⁸⁷

The situations when a comment is privileged under principles of public policy are based on the duty-interest principle or test. Lord Nicholls following Lord Atkinsons’s dictum in *Adam v Ward*¹⁸⁸ explained that there must be in existence some duty or interest in the making of the communication between the maker of the statement and the recipient.¹⁸⁹ But His Lordship adds that the position of the parties should not be allowed to obscure the rationale of the underlying public interest. His Lordship adds that the essence of the defence of qualified privilege is whether there was in the public interest a need for a particular recipient to receive frank and uninhibited communication from a particular source.

In *Jameel*, Lord Hoffman preferred to refer to the test in *Reynolds* as the ‘Reynolds public interest defence’.¹⁹⁰ His Lordship set out three determining factors when material will be deemed privileged. Firstly, determining whether the material is a matter of public interest which is left to the judge to decide and if the publication is in the public interest the duty and interest are taken to exist;¹⁹¹ secondly, whether the inclusion of a defamatory

¹⁸⁵ (n 149).

¹⁸⁶ (n 149) 615, the court quoting Lord Denning in *London Artists Ltd v Littler* [1969] 2 All ER 193 at 198, [1969] 2 QB 375, 391.

¹⁸⁷ (n 149) 626.

¹⁸⁸ [1917] AC 309, 334; [1916-17] All ER Rep 157, 170.

¹⁸⁹ (n 149) 616.

¹⁹⁰ (n 150) [46].

¹⁹¹ *ibid* [49].

statement was justifiable¹⁹² and finally, whether the steps taken to gather and publish the information were responsible and fair.¹⁹³ The last being the test of responsible journalism.

Lord Hoffman went on to add that whilst Lord Nicholls was speaking in the context of a publication in a newspaper, His Lordship extended the defence to be available 'to anyone who publishes material of public interest in any medium.'¹⁹⁴ The pronouncement by Lord Hoffman, perhaps unbeknown to His Lordship, opens the door to the potential for the test of responsible journalism to be extended to citizen journalists using the Internet and the various social media platforms who are contributing to socio-political matters of public interest. A discussion on this will be revisited in Chapter 6.

5.5.4 Responsible Journalism

The link between responsible journalism and the landmark cases of *Reynolds*¹⁹⁵ and *Jameel*¹⁹⁶ is public interest.

Reynolds, as discussed above, set out the *Reynolds*-type defence of qualified privilege and the proper approach to be taken by the courts in determining whether the author or publishers had acted responsibly in communicating the information to the public.

Jameel's contribution is in clarifying *Reynolds*' application in particular if the matter published was in the public interest and whether in the context of the whole article, the standard of responsible journalism has been met.¹⁹⁷ And '[I]f the public interest is engaged, the report is privileged if it satisfies the test of responsible journalism.'¹⁹⁸

Whilst *Reynolds* was decided in the context of a newspaper publication, as discussed *supra*, Lord Hoffman raised the possibility of the defence being extended to a publication in any medium.¹⁹⁹ And His Lordship adds that the question then turned on 'whether the defendant behaved fairly and responsibly in gathering and publishing the information.' If a citizen

¹⁹² (n 150) [51].

¹⁹³ (n 150) [53].

¹⁹⁴ (n 150) [54].

¹⁹⁵ (n 149).

¹⁹⁶ (n 150).

¹⁹⁷ *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750, 771 (Ward LJ) quoting (n 145) [48] (Lord Hoffman) and [107]-[108] (Lord Hope).

¹⁹⁸ *ibid* *Charman* [772], (n 146) [53] (Lord Hoffman).

¹⁹⁹ (n 189).

journalist on the Internet is publishing material that is deemed in the public interest, then the added requirement that needs to be met is whether the citizen journalist has acted fairly and responsibly in gathering and publishing the said information.

Although the element of fairness is not explicit in Lord Nicholl's ten-indicia test,²⁰⁰ it is suggested that it is implicit²⁰¹ but Lord Steyn in *Reynolds* came the closest when His Lordship stated 'the occasion must be one in respect of which it can *fairly* [my emphasis] be said that it is in the public interest that information should be published'.²⁰²

Ward LJ in *Charman* reiterates that 'weight must be given to the professional judgment of the journalist.'²⁰³ This point runs through both *Reynolds* and *Jameel*.²⁰⁴ Ward LJ commented that:

Reynolds's case must be seen as the House's attempt 'to redress the balance [between arts 8 and 10 of the convention] in favour of greater freedom for the press to publish stories of genuine public interest' (per Lord Hoffmann at [38]). Lord Bingham's criticism of the Court of Appeal (at [35]) was that its 'ruling subverts the liberalising intention of the *Reynolds* decision' concluding that '[i]t might be thought that this was the sort of neutral, investigative journalism which *Reynolds* privilege exists to protect'. Baroness Hale (at [150]) was of the view that '[w]e need more such serious journalism in this country and our defamation law should encourage rather than discourage it'. Lord Hoffmann (at [38]) was concerned 'that *Reynolds* has had little impact upon the way the law is applied at first instance'. These are sombre words of warning. I sense at once which way the wind from the House of Lords is blowing and I must trim my sails accordingly.'²⁰⁵

If the tone set by the House of Lords in *Reynolds* was to be less restrictive of publication to encourage serious investigative journalism or journalism of genuine public interest, then the

²⁰⁰ Discussed further in Chapter 6.

²⁰¹ (n 197) *Charman* [773] (Ward LJ).

²⁰² (n 149) 634; 213.

²⁰³ (n 201).

²⁰⁴ (n 149) 623-624; 202-203 (Lord Nicholl); *Supra*, (n 145) [33] (Lord Bingham) and [51] (Lord Hoffman).

²⁰⁵ (n 201) 775.

same standards enumerated in the test of responsible journalism could apply to citizen journalism on the Internet if they are fulfilled.

Lord Nicholls explained in *Bonnick v Morris* the direct relationship between the *Reynolds* privilege and responsible journalism:

Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which *a fair balance* [again my emphasis] is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.²⁰⁶

The universal theme of the test of responsible journalism espoused in *Reynolds* and *Jameel* makes it accessible to other jurisdictions and in the case of Malaysia, its application has been qualified, discussed in Heading 6.3.

5.6 Public interest and data protection

In Heading 5.4, reference was made to section 12(4) of the HRA where the court is to take cognizance in the context of Article 10(1), any relevant privacy code where it involves journalistic material. In reference to this provision, Nicol *et al* remarked that there is no specific privacy code that has been specified whereby the courts have the discretion of referring to any relevant code in contrast with the Data Protection Act 1998, where Section 32(3) of the said Act allows the government to stipulate the relevant code by subordinate legislation.²⁰⁷ Section 32(1) of the said Act provides an exemption where personal data is processed for special purposes which include for the purpose of journalism²⁰⁸ where the data was published as journalistic material. Regard must also be given to material which is of special importance in terms of its the public interest in exercising the freedom of

²⁰⁶ (2002) 12 BHRC 558, [23].

²⁰⁷ Andrew Nicol, Gavin Millar, Andrew Sharland, *Media Law & Human Rights* (2nd edn, OUP 2009) 65.

²⁰⁸ Section 3 of the Data Protection Act 1998.

expression.²⁰⁹ Material in the public interest is to be determined in accordance with a code of practice. In relation to journalistic material, the relevant code of practice would be the Press Complaints Commission Code of Practice, discussed in Heading 7.3.²¹⁰ The Code provides that public interest may be invoked to justify breaching 9 of the 16 clauses of the Code namely in matters involving privacy of individuals. The Code provides a list of non-exhaustive incidences of acting in public interest such as detecting or exposing crime or serious impropriety, protecting public health and safety, or preventing the public from being misled by an action or statement of an individual or organisation.²¹¹

The question for citizen journalists on the Internet is if they are involved in data processing within the context of the Act, will the exemption be extended to them? If they are seen to carry out a journalistic function and are publishing information which is in the public interest, then the extension may apply to them.²¹² However, a development of a code will be required.

5.7 Areas of protection of the press and media under article 10

5.7.1 Protection of journalistic sources

In carrying out its role as the ‘public watchdog’, it is essential that the law recognizes the protection of journalistic sources as a matter of great importance in the pursuit of matters of public interest. As discussed above, the ECtHR has recognized this importance. The only argument that will negate protection would be for the sources to be revealed on the basis of an “overriding requirement in the public interest”.²¹³ The law recognises the importance of anonymity of sources and that disclosure of identity of sources is required in circumstances prescribed by law. The recognition of this protection was found in common law²¹⁴ but it is

²⁰⁹ Section 32(1) (b) of the Data Protection Act 1998.

²¹⁰ Section 32(3)(a) of the Data Protection Act 1998; see also *Press Complaints Commission* <<http://www.pcc.org.uk/news/index.html?article=ODg>> accessed 21 July 2012.

²¹¹ PCC Code of Practice, <<http://www.pcc.org.uk/cop/practice.html>> 21 July 2012.

²¹² Discussed in Chapter 6.

²¹³ *Goodwin v UK* (1996) 21 EHHR 123,143.

²¹⁴ Pre-Section 10 position was summarized in Lord Diplock’s speech in *Secretary of State for Defence v Guardian Newspapers Ltd* [1984] 3 All ER 601,605; [1985] AC 339, 347–348.

now contained in Section 10 of the Contempt of Court Act 1981. There are numerous other legislation that qualify this right.²¹⁵ Section 10 reads:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

The rationale for the protection can be seen in the judgment of Griffiths LJ in *Secretary of State for Defence v Guardian Newspapers Ltd*:

The press have always attached the greatest importance to their ability to protect their sources of information. If they are not able to do so, they believe that many of their sources would dry up and this would seriously interfere with their effectiveness. It is in the interests of us all that we should have a truly effective press, and it seems to me that Parliament by enacting s 10 has clearly recognised the importance that attaches to the ability of the press to protect their sources ... I can see no harm in giving a wide construction to the opening words of the section because by the latter part of the section the court is given ample powers to order the source to be revealed where in the circumstances of a particular case the wider public interest makes it necessary to do so.²¹⁶

The Strasbourg court has ruled strongly in protecting free expression through the free press such as protecting the right of a journalist not to reveal his sources whereby the court held that 'the protection of journalistic sources is one of the cornerstones of freedom of the press.'²¹⁷ The House of Lords confirmed this position but qualified it by stating that there may be instances where disclosure may be justifiable and as long as it was necessary and not

²¹⁵ Police and Criminal Evidence Act 1984; Official Secrets Act 1989; The Police Act 1997; Regulation of Investigatory Powers Act 2000; Terrorism Act 2000 and Serious Organised Crime and Police Act 2005.

²¹⁶ [1984] 1 All ER 453,459; [1984] Ch 156, 166–167.

²¹⁷ *Roemen and Schmit v Luxembourg* [2003] ECHR 102 [46].

disproportionate.²¹⁸ This protection of the free press extends to speech that may ‘offend, shock or disturb’²¹⁹ such as racist insults²²⁰ or anti-Semitic views.²²¹

5.7.2 Concept of ‘Open Justice’

The ‘open justice’ principle is based on the principle that justice must not only be done but must be seen to be done. The House of Lords referred to Jeremy Bentham as did the US Supreme Court:

‘Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial...’²²²

As part of free speech, reporting of court cases by the media is an important feature of the press being the “watchdog of justice” and is capable of being asserted as a right.²²³ Robertson and Nicol promoted media reporting of court cases as enhancing ‘public knowledge and appreciation of the workings of the law’.²²⁴

This right to report cases may come in conflict with Article 6 of the European Convention which guarantees the right to a fair and public hearing. The circumstances in which the press and the public may be excluded are found in the same provision’s clause.

Article 6 (1) reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or

²¹⁸ *Ashworth Hospital Authority v MGN* [2002] UKHL 29, [2002] WLR 2033.

²¹⁹ (n 133) 49.

²²⁰ (n 121).

²²¹ *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 66.

²²² *Scott v Scott* [1913] AC 417 at 447.

²²³ *R v Felixstowe Justices Ex p Leigh* [1987] All ER 551.

²²⁴ Geoffrey Robertson and Andrew Nicol, *Media Law* (5th edn, Penguin 2008) 14.

the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Whilst the English common law through decisions such as in *Scott v Scott*²²⁵ limited the exceptions to the “open justice” principle, the exceptions provided by statute are seen as far more limited in comparison to Article 6(1). Robertson and Nicol commented that the exceptions in Article 6 are ‘actually *wider*’ than those provided by UK domestic law²²⁶ and that the “open justice” principle is ‘firmer in British domestic law than in the European Convention’.²²⁷ They pose the question ‘whether the incorporation of the Convention could operate to cut down any of the basic rights that are already enjoyed - in this case, a basic English right which was watered down by the convention draftsmen to accommodate the less vigorous practice in other European jurisdictions?’²²⁸ To remedy this, English judges may have to invoke the safeguard provision, Section 11²²⁹ of the HRA to continue to rely on the established principles of the “open justice” prior to the coming into effect of the Convention Rights.

In cases where anonymity orders have been applied for restraining the publication of reportable details in protecting privacy under Article 8, this can be seen as a derogation of the principle of open justice and deemed an interference with Article 10 rights. Therefore, the court will consider several aspects, as stated by Neuberger LJ:

Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under art 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any

²²⁵ [1913] AC 417.

²²⁶ (n 224) 15.

²²⁷ *ibid* 16.

²²⁸ *ibid*.

²²⁹ Section 11 reads: ‘A person’s reliance on a Convention right does not restrict - (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom...’.

resulting curtailment of his right and his family's right to respect for their private and family life.²³⁰

5.7.3 Prior restraint

The rule against prior restraint in the UK can be traced back to Blackstone's Commentaries:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Interestingly the Commentaries make no reference to freedom of speech but instead to freedom of the press. Whilst taken on as a constitutional consequence of the First Amendment in the US, the position against prior restraint was weak owing to the lack of constitutional provisions in the UK. The greatest weakening element seen is the issuance of interim injunctions. The interim injunction is granted on the basis of an alleged breach of confidence. A restraining order can be obtained if the applicant can show on a *prima facie* basis that on a balance of convenience, the public interest in protecting the confidence outweighs the public interest in publishing the information. The use of such injunctions received much attention during the *Spycatcher* case.²³¹ It has been commented that the *Spycatcher* decision acted to establish that if such an injunction has been granted against one newspaper, it serves to bind all other sections of media.²³² In light of Article 10 of the Convention, the ECtHR found that the injunction against publishing was an infringement of the right to free expression particularly when the book achieved best seller status outside the UK.²³³ The European Court, whilst acknowledging the use of prior restraint in cases of

²³⁰ *JIH v News Group Newspapers Ltd* [2011] 2 All ER 324 at p 331, [2011] EWCA Civ 42 at [21].

²³¹ *AG v Guardian Newspapers* [1987] 3 All ER 316.

²³² (n 224) 26; see also *AG v Times Newspapers Ltd* [1992] 1 AC 191, HL.

²³³ (n 120). *The Observer and Guardian v UK* (1991) 14 EHRR 153.

national security, highlighted the dangers of prior restraint particularly in the case of the press, where delay of the publications of news may deprive it of its value and importance.²³⁴

The gagging orders which have come to be known as “superinjunctions” not only block the media and the press from reporting details of a story, but also prohibit the media from reporting on the existence of the said order. The *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*,²³⁵ was published on 20 May 2011. The committee, led by Lord Neuberger, the then Master of the Rolls, was set up in the wake of concern of the growth of use of such injunctions acting as a prior restraint.

In para 2.1 of the report, super-injunctions have been described as follows:

The term has been used to describe interim injunctions:

- which provide for party anonymity;²³⁶
- which contain a prohibition on publishing or disclosing the fact of the substantive order and proceedings;²³⁷
- which provide both for party anonymity, a prohibition on publishing or disclosing the fact of the substantive order and proceedings, as well as, for instance, restricting access to documents on the court file.²³⁸

²³⁴ (n 224) 60.

²³⁵ Available at <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>> accessed 21 July 2012.

²³⁶ Fn 53 of the Report: Lamont (2009): ‘the “super” bit of the injunction is that it uses the court’s powers to anonymise cases . . . so that the public has no idea what is going on.’

²³⁷ Fn 54 of the Report: The Guardian (14 October 2009) ‘A ‘super-injunction’ is one which not only prevents publication, but which is itself secret.’; Judge (2009); ‘Can we be clear what we mean by what is called “super-injunction”. I understand it to mean that, following an injunction, an order is made that the fact of the injunction shall not be disclosed or published.’; Heath MP (2009) ‘The second issue is whether such super-injunctions are right in any case. That point has been made by my hon. Friend the Member for Oxford, West and Abingdon and others. The *Idea* that we have somehow lost the principle of open court, and can now not only stop the publication of a particular piece of information by prior restraint but prevent from being known even the fact that it has been before a court, seems a very suspect legal development of recent years, and I question it.’; Ponsford (2010); and Ntuli v Donald [2010] EWCA Civ 1276 at [44] – [46].

²³⁸ Fn 55 of the Report: Robinson (2009), “Super-injunctions” that prevent news organisations from revealing the identities of those involved in legal disputes, or even reporting the fact that reporting the fact that reporting

In para 3.17, the Committee emphasises that such injunctions do not generally bind the entire media. The Committee states that; ‘They are not *contra mundum* orders (ones against the world), which are only very rarely granted by way of a final, not an interim, injunction. The interim injunctions considered in this report only bind those who are notified of them by the applicant.’ The report serves as guidance of the various steps to be taken in the issuance of such injunctions in order to ensure that a balance is struck between competing interests – the privacy of the applicant and the public interest to publish of the media. The controversy also surrounds the issue whether such injunctions are efficacious in the Internet age as seen in the *Twitter* revelation of the Ryan Giggs affair by thousands of tweets of a matter that was protected by the court’s injunction²³⁹ and then again in the Jeremy Clarkson case.²⁴⁰

Apart from gagging orders that may impact social media activity and citizen journalism on the Internet, there is the possibility of use of prior restraint on social media as threatened by the government during the London riots in 2011 when Prime Minister David Cameron was considering a “pre-crime” blocking of social media when it is being used for ‘plotting violence, disorder and criminality’.²⁴¹ Threats to block platforms such as *Twitter* and *BBM*, the Blackberry messaging service, as opposed to blocking particular users demonstrates the difficulty of identifying particular users who may be the source of the information deemed unacceptable.

6. Freedom of speech in Malaysia

The feature of the Malaysian Legal System’s constitutional supremacy is very similar to the Indian Model “with a written and supreme constitution and a chapter on fundamental rights but with a Parliament vested with extensive constitutional powers to curtail fundamental rights on the grounds permitted by the basic charter.”²⁴² In *Ah Thian v Government of*

restrictions have been imposed, have recently emerged.’; Busuttil (2009) at (4); and *Terry v Persons Unknown* [2010] 1 FCR 659 at [24]. See also *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB) May 23, 2011.

²³⁹ *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB); Ursula Smartt, ‘Twitter undermines superinjunctions’ (2011) 16(4) Comms L 135.

²⁴⁰ [2010] EWHC 2457 (QB); [2010] All ER (D) 48 (Oct).

²⁴¹ Olivia Soon, ‘U.K. Prime Minister Suggests ‘Pre-Crime’ Blocking of Social Media’ (*Wired*, 11 August 2011) <<http://www.wired.com/business/2011/08/uk-block-social-media/>> accessed 21 July 2012.

²⁴² Shad Saleem Faruqi, ‘Free Speech and the Constitution’ [1992] 4 CLJ 1 xiv.

Malaysia,²⁴³ Tun Suffian LP, as he then was, commented; ‘The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and the State Legislatures in Malaysia is limited by the Constitution and they cannot make any law they please.’ The relevant articles that give credence to His Lordship’s pronouncement are Articles 4(1)²⁴⁴ read together with Article 128²⁴⁵ and 162(6).²⁴⁶

6.1 The limitation of freedom of speech

Although freedoms in the Malaysian legal system are enshrined in the Federal Constitution, it is an accepted fact in many legal systems that much of these freedoms are qualified by a volume of statutes and common law, and Malaysia is no exception.²⁴⁷ Article 10 Clause 1 of the Federal Constitution reads that ‘every citizen has the right to freedom of speech and expression’. The article is limited to citizens and does not expand on what the freedom includes. In the case of Article 10 of the European Convention where the freedom is extended to all with the use of the words ‘Every one’ and the right includes ‘freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’ There is no explicit extension of the right to the press or the media in general.

Article 10 Clause 1 of the Federal Constitution is subject to certain clauses such as clause 2 which reads:

²⁴³ [1976] 2 MLJ 112.

²⁴⁴ Article 4(1) reads; “this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void.”

²⁴⁵ Article 128 reads;

“(1) The Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction -

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Supreme Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.”

²⁴⁶ Article 162(6) reads; “Any Court or tribunal applying the provisions of any existing law ... may apply it with such modification as may be necessary to bring it into accord with the provisions of this Constitution.”

²⁴⁷ See judgment of Raja Azlan Shah, FCJ (as he then was), in *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 referred *infra*.

(2) Parliament may by law impose -

a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

The above restrictions are wide and the omission of any qualification on the restrictions leaves the courts minimal jurisdiction to review the constitutionality of a legislation which acts as the restrictive mechanism. For instance, in the Indian Constitution, the phrase “reasonable restriction” indicates a clear qualification and more importantly, an avenue for the courts to undertake the balancing exercise, discussed *infra*.

Undeniably, the application of the provisions for revocation could be justified but they must be exercised by achieving a ‘balance between individual liberty and social control’²⁴⁸ and a degree of proportionality in the powers that may be exercised under the restrictions. Raja Azlan Shah, FCJ (as he then was), in *Public Prosecutor v Ooi Kee Saik & Ors*²⁴⁹ commented that the Indian Supreme Court ‘has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community quoting *AK Gopalan v State of Madras*²⁵⁰ where the court commented that:

There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace and general order and moral of the community ... What the Constitution attempts to do in declaring the

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

²⁵⁰ AIR 1950 SC 27.

rights of the people is to strike a balance between individual liberty and social control.

In the case of Malaysia, there is a plethora of statutes that stipulate restrictions of the freedom of speech and expression. One of the earliest statutes to do this was the Printing Presses Act 1948. It was replaced with the Printing Presses and Publications Act 1984²⁵¹ and is the main legislation that regulates the press. Section 3 of the said Act makes it clear that no person 'shall keep for use or use a printing press unless he has been granted a licence under subsection (3).' The licence has to be renewed annually. There are several controls that are attached to the licence. These can be seen in the form of sections 4 and 13 of the said Act. Section 4 reads:

(1) Any person who prints or produces, or causes or permits to be printed or produced by his printing press or machine any publication or document-

(a) which is obscene or otherwise against public decency; or

(b) which contains an incitement to violence against persons or property, counsels disobedience to the law or to any lawful order or which is or is likely to lead to a breach of the peace or to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity,

shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.

Section 13 empowers the Home Minister to revoke or suspend a licence or permit 'where the licence that has been issued is used for printing of any publication which is prejudicial to public order or national security or that any newspaper in respect of which a permit has been issued contains anything which is prejudicial to public order or national security'.

²⁵¹ Act 301. The long title of the Act read, "An Act to regulate the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith."

Further, there is the Sedition Act 1948.²⁵² The Act defines that an act is “seditious” when it is applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency; and “publication” includes all written or printed matter and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy and reproduction or substantial reproduction of any publication.²⁵³

Section 3 enumerates what may be tantamount to “seditious tendency”²⁵⁴ and the provisions within the section are quite general and widely worded. These include:

- (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
- (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;
- (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;
- (e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or
- (f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

²⁵² Act 15. The Act was revised in 1969 with the revision taking effect on 14 April 1970.

²⁵³ Section 2 of the Sedition Act 1948.

²⁵⁴ Section 3(1) of the Sedition Act 1948.

Justice Ajaib Singh in *Public Prosecutor v Oh Keng Seng*,²⁵⁵ a case involving an alleged seditious speech made at a public rally, upon stressing the importance of freedom of speech being a fundamental right of citizens in a democratic state equally emphasized the importance of qualifying that freedom in order to protect state and private interests.²⁵⁶ Justice Singh emphasised that the Sedition Act clearly limits the right to freedom of speech and expression and the constitutionality of the said Act cannot be challenged as Article 10 provides for such limitation and the Act is designed to impose restrictions. The court was also quick to add on the scope of the Act, differentiating between socio-political discourse and seditious speech:

Bona fide and fair criticism of government policies and of opposition political parties is not within the mischief of the Sedition Act so long as the speaker does not exceed the bounds allowed to him under the law. The question here is whether the speech delivered...is seditious within the ambit of the Sedition Act or *whether it is a bona fide discourse on political and social matters and on the contemporary political situation*.²⁵⁷ [Emphasis added]

The Sedition Act also qualifies parliamentary privilege in Malaysia. The Federal Court in *Mark Koding v Public Prosecutor*²⁵⁸ premised its decision on the constitutional supremacy of Article 10 of the Federal Constitution and the restriction stated therein allows the Sedition Act to qualify the said privilege.

The balancing exercise undertaken by the Malaysian courts often draws direction from the Indian Supreme Court decisions. This is done on the basis that the qualification of free speech in the Indian Constitution in Article 19 is *pari materia* the Malaysian Article 10 and where the Indian Supreme Court has explicitly stated that the US Constitution's First Amendment in terms and expression is "totally and radically different" from the Malaysian

²⁵⁵ [1979] 2 MLJ 174.

²⁵⁶ *ibid* 177.

²⁵⁷ *ibid*.

²⁵⁸ [1982] 2 MLJ 120 at p 123.

position.²⁵⁹ It is to be noted that the wording in the Indian Article 19 and the Malaysian Article 19 are not *pari materia*. One clear difference in the wordings is the explicit use of the phrase “reasonable restrictions” which is omitted in the Malaysian provision.²⁶⁰ The Indian Supreme Court can decide on the constitutionality of legislation on the ground that the restriction imposed is unreasonable. Harding commented that Article 10 of the Federal Constitution ‘is remarkable for what it takes away rather than for what it gives.’²⁶¹ He adds:

The idea that restrictions are sometimes necessary on political rights is common place. Art. 10, however, is unusual in its failure to place any real restrictions on the restrictions. They are so widely drafted that in practice there are likely to be very few possible restriction which could not be said to come within the kinds of restriction permitted by Art.10, especially there is nothing in Art.10 to suggest that the courts have any right to review the necessity of legislation restricting one of these rights. The result is therefore quite different from that achieved in the Indian Constitution, which allows only such restrictions as are reasonable, such reasonableness being a matter for the courts to decide on judicial review.²⁶²

Is there any avenue for the Federal Court, the constitutional court, to review such restrictions? Edgar Joseph SCJ at the Supreme Court (the apex court then) in *Public Prosecutor v Pung Chen Choon*²⁶³ laid down several guidelines as to when the court can declare restrictions as either falling within or without the permissible restrictions:

²⁵⁹ See Siti Norma Yaakob J (as she then was) in *Lee Kuan Yew v Chin Vui Khen & Anor* [1991] 3 MLJ 494, at p 503. Reference was also made to *Santokh Singh v Delhi Administration* AIR 1973 SC 109 and *Purshottam Ltd v Prem Shanker* AIR 1966 All 377.

²⁶⁰ The Indian provision reads:

Right to Freedom.

19(1) All citizens shall have the right —

(a) to freedom of speech and expression.

(2) Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the Security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

²⁶¹ Andrew Harding, *Law, Government and the Constitution in Malaysia* (MLJ 1996) 189.

²⁶² *ibid* 189-190.

²⁶³ [1994] 1 MLJ 566, 577-579.

It would be the duty of the court to consider each impugned law separately, regard being had to the nature of the Right alleged to have been infringed, the underlying purpose of the restriction, the extent and the urgency of the evil sought to be remedied, not forgetting the prevailing conditions of the time. We hasten to add that it is not that the meaning of the words in the impugned law changes with the prevailing conditions of the time but that the changing circumstances illustrate and illuminate the full import of that meaning... it is necessary for the court to determine whether this impugned provision is in pith and substance a law passed by Parliament to restrict such Right as Parliament deems necessary or expedient 'in the interest of' the security of the Federation or any part thereof; friendly relations with other countries; public order or morality or the impugned provision is in pith and substance a law 'to provide against' contempt of court, defamation or incitement to any offence... the objects of the impugned law must be sufficiently connected to the subjects enumerated under art 10(2)(a). The connection contemplated must be real and proximate, not far-fetched or problematical.

Therefore, if the restrictions enacted do not serve the interests set out in Article 10 Clause 2 of the Federal Constitution, the said law is therefore subject to a challenge in the apex court.

Additionally, the Home Minister has powers under the Internal Security Act 1960.²⁶⁴ For instance, section 22 of the said Act²⁶⁵ reads;

- (1) Where it appears to the Minister charged with responsibility for printing presses and publications that any document or publication-
 - (a) contains any incitement to violence;
 - (b) counsels disobedience to the law or to any lawful order;

²⁶⁴ Act 82. The Act was revised in 1972 with the revision taking effect on 1 August 1971.

²⁶⁵ Part II General Provisions Relating to Internal Security, Chapter III Special Powers Relating to Subversive Publications, Etc. (Act 82).

- (c) is calculated or likely to lead to a breach of the peace, or to promote feelings of hostility between different races or classes of the population; or
- (d) is prejudicial to the national interest, public order, or security of Malaysia, he may by order published in the Gazette prohibit either absolutely or subject to such conditions as may be prescribed therein the printing, publication, sale, issue, circulation or possession of such document or publication.

Cases where action has been taken falls under various sections such as section 8A of the Printing Presses and Publications Act 1984²⁶⁶ where editors can be charged for malicious publication for publishing false news²⁶⁷ and similarly, an individual could be charged for publishing a pamphlet which contained seditious and false news.²⁶⁸

Other legislation that has been used or can be utilised in controlling the media includes the criminal defamation provision in the Penal Code²⁶⁹.

The position of journalists is not a special position or a privileged one and journalists are subject to the same law as the ordinary man. The sentiments can be summarised by Justice Ahmad's phrase in *Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar's* case where he stated that 'the freedom of the press ends where the force of the law begins.' In *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd*,²⁷⁰ the High Court commented that 'journalists, editors and newspapers do not have any special positions so as to entitle them to rely on the defence of qualified privilege on any matters which they may publish'.

²⁶⁶ Part IV Control of Undesirable Publication. Section 8A provides for the offence to publish false news. It reads:

(1) Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.

(2) For the purposes of this section, malice shall be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news.

²⁶⁷ *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566.

²⁶⁸ *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14.

²⁶⁹ Act 574. Section 499 reads; "Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

²⁷⁰ [1996] 1 MLJ 393 (HC) at 411.

6.2 Lack of privileges and rights

6.2.1 Confidentiality of sources

There are no special privileges accorded to journalists. There is little explored jurisprudence in the area of confidentiality of sources in Malaysia where the focus of the legislature has been more on imposing criminal provisions, as discussed above. Das²⁷¹ is of the opinion that there is some salvation in section 136 of the Evidence Act 1950.²⁷² The fact that may be given in evidence is limited to that which is required to prove the fact in issue or where it is a relevant fact.²⁷³ Once a fact is declared to be relevant by any subsection of section 136, it is admissible. This is to ensure that evidence is confined to relevant facts that do not stray from the issue at trial. A journalist may rely on the evidential rule whereby only relevant evidence is admissible and the said provisions will enable the court to 'maintain the balance between unnecessary disclosure and the interests of justice'.²⁷⁴ In essence, it allows the presiding Judge to enquire into whether the evidence that was sought to be adduced is legally relevant to the facts in issue, failing which the evidence is to be excluded or prohibited and this is dependent on the basis for which the publication is actionable. In a defamation suit, if the journalist is to rely on the defence of truth or justification under Malaysian Law, then the identity of this source would be a relevant fact under section 136 subsection 2. However, under a criminal charge for sedition, the court will enquire whether the words published were 'seditious' in nature, discussed in Heading 6.1, without regard for the source of the publication and hence, the identity of the confidential source may not be a relevant fact.

²⁷¹ Cyrus V Das, 'The Legal Protection of Journalists' Sources [2002] 4 MLJ cxlv.

²⁷² Act 56. Section 136 reads:

(1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the fact and the court is satisfied with the undertaking.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

²⁷³ Section 3 of Evidence Act 1950 defines "fact in issue" as 'any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows' and "relevant fact" as one fact is said to be relevant to another when the one is connected with the other in any of the way' referred to in the provisions of the Evidence Act 'relating to the relevancy of facts'.

²⁷⁴ (n 271).

6.2.2 Concept of “open justice”

As far as the press is concerned, there is a general provision for the concept of ‘open justice’ and no special recognition of the right for the press to report court proceedings. Section 15(1) of the Courts of Judicature Act 1964²⁷⁵ prescribes that courts are to be open and public save as in when the proceedings are carried out *in camera* ‘if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.’

6.2.3 Prior restraint

Powers vested in the executive through the various legislations as discussed above implicitly act as a tool of censorship by the government and self-censorship on the part of editors to avoid any criminal sanctions or loss of licence. Wang comments that legislation such as the Printing Presses and Publications Act ‘impinges on the media’s effectiveness in playing its role as disseminator of information and watchdog over the government of the day’, curbing press freedom and preventing the journalists from carrying out investigative journalism.²⁷⁶

Quah *et al* add that the general lack of freedom of the press is as a result of control of the media by one or more of the political parties.²⁷⁷ This control leads to the media being an “inept” watchdog where news is filtered before being reported to the public and where journalists are conflicted in their role facing an ethical dilemma - to report the truth or to protect political interests.²⁷⁸

6.3 Public interest, responsible journalism and *Reynolds*

The Federal Court in *Dato’ Seri Anwar Ibrahim v. Dato’ Seri Dr Mahathir Mohamad*²⁷⁹ endorsed the High Court’s application of the law on qualified privilege when the latter in its

²⁷⁵ Act 91. Section 15(1) reads: The place in which any Court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access: Provided that the Court shall have power to hear any cause or matter or any part thereof *in camera* if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.

²⁷⁶ Wang Lay Kim, ‘Media and Democracy in Malaysia’, (2001) 8(2) *Javnost - The Public* 67, 80.

²⁷⁷ Quah Chun Hoo, Leong Shi Yeing, Guok Eng Chai, ‘Ethics Code Awareness, Usefulness and Professionalism of Malaysian Journalists’ (Aug 2010) 5(2) *Journal of Business Systems, governance and Ethics* 31, 33.

²⁷⁸ *ibid.*

²⁷⁹ [2001] 2 MLJ 65 (FC) 68-69.

decision²⁸⁰ applied the *Reynolds'* privilege as set out by the Court of Appeal.²⁸¹ The High Court held that the matter was of public interest, concerning the government and political affairs. This arose when the Prime Minister, the defendant, had in an answer to a journalist's question, given reasons for removing the plaintiff who was then the Deputy Prime Minister. The High Court also went on to rationalise the defendant's statement in line with the duty-interest form of qualified privilege when commenting that as Prime Minister of the country, the defendant was 'under a legal, moral and social duty to inform the nation of the matters concerning the plaintiff and at the same time to explain to the nation the response of the government...to the several attacks made by the plaintiff as they were matters of general public interest which the public had every reason, and an interest, to know.'²⁸²

In a recent case in the High Court of Malaysia, pending appeal to the Court of Appeal, Justice Abraham had to address the application of *Reynolds* and *Jameel* in Malaysia.²⁸³ In a libel case involving the publication of an article in a newspaper which was a republication of an article on a blog, the defendants raised the defence of qualified privilege relying on both *Reynolds* and *Jameel*. The judge, when referring to the decisions of English courts on the defence of reportage, cited the approach in *Jameel* to be a preferable one. The judge however cautioned that the approach may vary in its application in Malaysia owing to the need to take 'a balanced approach to the sensitivities of a multicultural, multi religious society which require a high standard of caution to be exercised by the media as responsible media'.

The importance of responsible journalism in establishing the defence of qualified privilege was highlighted in the High Court decision in *Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar*²⁸⁴ and the Court of Appeal decision in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd*²⁸⁵ where the courts set out several criteria for responsible journalism to exist such

²⁸⁰ *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [1999] 4 MLJ 58 (H.C.)

²⁸¹ [1998]3 All ER 961.

²⁸² (n 279).

²⁸³ *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301.

²⁸⁴ [1998] 6 MLJ 365.

²⁸⁵ [1999] 1 MLJ 371.

as *inter alia*, factual reporting, verification of truth, fair reporting, neutrality²⁸⁶ and in the latter case, in the reporting of matters of public interest, the reporting must not be inflammatory or tainted with bias, avoiding sensational reporting and taking into account sensitivities of a multiracial society.²⁸⁷

Reynolds has a doctrinal basis in Malaysia and its place in the Malaysian jurisprudence is strong. As Kenyon and Ang put it:²⁸⁸

The developments in qualified privilege in Malaysian law, just as in other common law jurisdictions, can be linked to wider trends of increasing freedom for public speech. News gathering and dissemination in Malaysia are shifting from traditional print and broadcast media, with links to governing interests, to encompass more diverse media forms including a variety of internet-based publications. In addition, the 2008 Malaysian general election results suggest a move away from what has been called a semi- or quasi-democratic model towards increased public speech and engagement.

7. Professional codes

If the role of the law is to provide a legal response in setting perimeters within which the role played by the press and the media can be prescribed and determined, the challenge is to determine the shape of this response in an environment which is deinstitutionalised or less institutionalised in view of how news and information is being shared on the Internet. In *Stoll v Switzerland*,²⁸⁹ the Grand Chamber of the Strasbourg Court advised that:

In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.

²⁸⁶ *Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar* [1998] 6 MLJ 365, 376; *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371(CA) 375.

²⁸⁷ *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 (CA) 375.

²⁸⁸ Andrew T Kenyon and Ang Hean Leng, 'Reynolds Privilege, Common Law Defamation and Malaysia' (Dec 2010) *Singapore Journal of Legal Studies* 256, 280.

²⁸⁹ (n 116) [104].

The 'ever-growing number of players' includes citizen journalists on the Internet. As a self-regulatory mechanism, professional ethics may assist citizen journalists on the Internet to attain the standards and credibility of professional journalists in collecting the information for publication and the way in which the publication is written.²⁹⁰

In executing the democratic role of the press in providing information, opinion, comment or debate on a range of socio-political issues, the quality of this information is often called into question. This chapter has in the preceding pages discussed and set out numerous legal principles upon which this quality is to be attained as a result of the constitutional principles of freedom of speech and expression that enables the press to function in its role. The framework ensures this question by guaranteeing certain rights and also by imposing restrictions and responsibilities. The reality is that a legal framework does not guarantee compliance. Hence, the interplay between the law and ethics in the media is an important one. In order to act within legal boundaries, journalists have to make ethical judgments. In making these ethical judgments, journalists demonstrate standards of professional competence.²⁹¹ These ethical considerations have found their way into professional codes of conduct.

Voluntary codes have been developed in the professions as an attempt to initiate thinking about unethical behaviour or practices and are therefore equally important to professional journalists in the same way as duties and obligations imposed by the law. These codes elevate journalism to the professional status bringing journalists together in a "collective public commitment"²⁹² - a yardstick of acceptable behaviour and standards - a type of soft law. Some are more robust than others with a secondary function as a disciplinary mechanism with a complaints procedure in cases of breach and others are more contemporary, evolving with the needs or expectations of both journalists and society. Whilst enforcement of such codes in a self-regulatory regime may vary from country to country, there is no denying the fact that professional codes act as one of the sources of

²⁹⁰ Further discussed in Heading 2 in Chapter 6.

²⁹¹ Stephen Klaidman and Tom L Beauchamp, *The Virtuous Journalist* (OUP 1987) 12.

²⁹² Andrew Belsey and Ruth Chadwick, 'Ethics as a Vehicle for Media Quality' (1995) 10 *European Journal of Communication* 461, 467.

media responsibilities as an effective regime of self-regulation will avoid the need for restrictive legislation.

The content of these codes reflects several of the values and norms of the journalistic profession whereby the principles found therein can be regarded as 'the profession's interpretation of the public interest demands, amended by the aspects connected to the professional integrity'.²⁹³

7.1 International Federation of Journalists

The Declaration of Rights and Obligations of Journalists, known as the Munich Charter of 1971²⁹⁴ adopted by the International Federation of Journalists is another document that provides an international context as a point of reference for global values for media ethics. The Charter emphasises the importance of the right to information and to freedom of expression as a fundamental right of man and that all rights and duties of journalists stem from this right. The charter contains a declaration of duties and a declaration of rights. The declaration of duties takes the form of a code imposing obligations on journalists when gathering, editing and commenting on news. These include, *inter alia*, to respect truth, to defend freedom of information, comment and criticism; to report only on facts of which he knows the origin; not to suppress essential information nor alter texts and documents as well as listing what the charter regards as grave professional offences, such as the following: plagiarism, calumny, slander, libel and unfounded accusations. The declaration of rights sets out claims that journalists have such as the right to free access to all information sources and the right to freely enquire on all events conditioning public life save in exceptional cases.

7.2 US

Society of Professional Journalists' Code of Ethics²⁹⁵ is not intended as a set of "rules" but a resource of ethical decision-making. It is explicitly stated on the Society's website that the

²⁹³ Ari Heinonen, *Vahtikoiran omatunto: Journalismin itsesääntely ja toimittajat (The conscience of a watch dog: Self-regulation of journalism and journalists)* (University of Tampere 1995) 45, 63.

²⁹⁴ Munich Declaration of the Duties and Rights of Journalists (1971). The declaration was drawn up and approved in Munich, Germany, on 24 and 25 November 1971 at a meeting of representatives of the Journalists' Unions of the six countries of the European Community.

²⁹⁵ Current version is the 1996 edition. (n 154).

code is not seen as a legally enforceable one as it is a voluntary code.²⁹⁶ The preamble of the code emphasizes that duty of the journalists is the furtherance of public enlightenment as the 'forerunner of justice and the foundation of democracy.'²⁹⁷ And to do this by 'seeking truth and providing a fair and comprehensive account of events and issues.'²⁹⁸ The four main tenets of the code are to seek truth and report it by being honest, fair and courageous in gathering, reporting and interpreting information; to minimise harm by respecting sources, subjects and colleagues; to act independently by being free of obligation to any other interest other than the public's right to know; and to be accountable to readers, listeners, viewers and each other. The society clarifies its position as a non-investigatory and non-disciplining entity but emphasises that the importance of the code is to provide a framework to evaluate ethical behaviour.

7.3 UK

The National Union of Journalists has an established Code of Conduct and Working Practices. The code was first drawn up in 1936 and the union prides itself on formulating a code that has been used as a template by other national unions. In addition to the code setting out 'the basic principles of responsible independent journalism',²⁹⁹ the union provides specific guidelines on reporting news on terrorism, refugees in Ireland and protection of sources against the state. The code prescribes 17 basic principles³⁰⁰ covering areas including *inter alia* upholding media freedom, the right of freedom of expression, right of the public to be informed; dissemination of fair, honest and accurate information; correcting harmful inaccuracies; differentiating fact and opinion; non-intrusion of a person's private life, grief or distress unless justified by overriding public interest consideration; non-production of material likely to lead to hatred or discrimination; and avoiding plagiarism. In addition to the code, the union also sets out 10 *Ethical Guidelines and Working Practices for NUJ Press/PR and Information Officer Members*.

²⁹⁶ (n 154) <<http://www.spj.org/ethicsfaq.asp>> accessed 21 July 2012.

²⁹⁷ (n 154).

²⁹⁸ (n 154).

²⁹⁹ National Union of Journalists <<http://www.nuj.org.uk/innerPagenuj.html?docId=25>> accessed 21 July 2012.

³⁰⁰ *ibid* <<http://www.nuj.org.uk/innerPagenuj.html?docId=174>> accessed 21 July 2012.

The UK Press Complaints Commission, an independent self-regulatory body, sets out the Editors' Code of Practice³⁰¹ and a complaints procedure for editorial content on newspapers and magazines. The code is an evolving code and the latest version, after 30 changes since 1991, was ratified in January 2012. The website of the Commission sets out in detail its remit in the kind of complaints that it can investigate, its powers and the procedure.³⁰² There is no obligation for the members of the press to "sign-up" to the Editors' Code and compliance with the standards or the sanctions arising from adjudication is voluntary. Whilst the code is viewed as a means to maintain high ethical standards and to serve public interest, it also serves to introduce a shame culture where there is publicity of a breach of the code.³⁰³ One of the criticisms levelled at the Code is that it is more concerned with the ways in which material is gathered rather than how it is presented to the public and that whilst there are hints of the aims of the Code in the preamble, there needs to be a more extensive statement of the Code's basis, purpose and necessity.³⁰⁴

7.4 Malaysia

The Malaysian code of ethics was formulated and set out by the National Union of Journalists in 1962 when the union was established. It is a very basic code with eight brief points.³⁰⁵ These cover aspects such as respect for truth and for the right of the public to truth as being the first duty of journalists, to defend press freedom, factual reporting, use of fair methods, duty to rectify harmful inaccurate information, respect for secrecy of source, identification of grave professional offences such as plagiarism, calumny, slander, libel and bribery. Although the objectives of the union stipulates that it deals with the professional conduct of its members but it does not stipulate any other information on how this is done or whether the public can lodge a complaint against a member.

³⁰¹ Since 1991.

³⁰² Making a Complaint, *Press Complaints Commission* <<http://www.pcc.org.uk/complaints/makingacomplaint.html>> accessed 21 July 2012; Further discussion in Chapter 6.

³⁰³ Andrew Belsey and Ruth Chadwick, 'Ethics as a Vehicle for Media Quality' (1995) 10 *European Journal of Communication* 461, 471. The code states that 'Any publication judged to have breached the Code must publish the adjudication in full and with due prominence agreed by the Commission's Director, including headline reference to the PCC.'

³⁰⁴ *ibid* 469.

³⁰⁵ *National Union of Journalists Peninsular Malaysia* <<http://www.nujm.org/nuj/about.php>> accessed 21 July 2012.

8. Concluding remarks

8.1 Freedom of speech and expression

Reliance on the sentiments of the US Supreme Court justices namely Cardozo and Brandeis, who view free expression as the basis for the existence of liberty and justice and that lack of such freedom will result in repression with dangerous consequences, articulates the essence of the motivation for socio-political discourse that provides credence to citizen journalists on the Internet. Brandeis's phrase - 'public discussion is a political duty' - exemplifies the importance of such discourse. The freedom of speech and expression whether in terms of the First Amendment or Article 10 of the European Convention, has been the basis for the functioning of the traditional mainstream media's multifarious roles as public "watchdog", acting as conduit between state and citizenry or between citizens, and the publisher of news, information, commentary on matters of public interest. The elevated position of the press in playing this role in First Amendment jurisprudence rests on its ability for professional journalists, to be the "provider" of news and information and all other ancillary roles – to publish, distribute, write, and to investigate. The harnessing of these abilities and skill is increasingly employed by citizen journalists on the Internet owing to the accessibility and availability of the technology and the "know-how" discussed in Chapter 4. The basis for according traditional mainstream media the importance of this role could be extended to citizen journalists on the Internet who publish information on socio-political issues of public interest who are indeed executing a similar role. The statement by Lord Bingham in *McCartan*, in Heading 5.2 *supra*, referring to the media being 'a small minority of citizens who can participate directly in the discussion and decisions which shape the public life' has to be qualified as the hegemony of the traditional media of stimulating discourse, debate and shaping public life has been diluted. On a similar note, the ECtHR referred to the press in *The Observer and Guardian* case, in Heading 5.3, of the task of the press in imparting information and ideas of public interest in playing its roles as a "public watchdog" could similarly extend to the citizen journalist on the Internet if the publishing of information, debate, commentary and opinion has the same effect.

In so far as the kind of constitutional protection extends to citizen journalists, references to Barendt's three perspectives are helpful. The perspectives sought to determine the extent to which the freedom of speech enshrined in the First Amendment protects the speech by the press and media. The perspective that is seen to be favourable in protecting citizen journalism on the Internet is the third perspective. The third perspective which only sees fit to extend protection to speech in consideration of the degree in which the said speech promotes the values that is at the core of freedom of expression such as matters of public interest seem to cloak socio-political discourse by citizen journalists with a favourable protection.

8.2 Balancing the rights

In balancing the right of free speech and other rights such as national security or reputation of individuals, the US courts seem to adopt either an "ad hoc" or "definitional" balancing - the former turning on the facts of individual cases and the latter on type and value of speech as well as category of speaker. Ingber feels that this will only serve to make it easier for governments to regulate such speech since the class of speakers and type of speech is identifiable. This may not be wholly accurate. Whilst the courts may be able to identify the type of speech that should enjoy protection of the First Amendment, the emergence of a new class of speakers in the form of citizen journalists on the Internet contributing to socio-political discussion as result of a medium of speech which is constantly evolving reasons a reconsideration of Ingber's views. The courts will have to reconsider the inclusion of new players in the class of speakers. The adoption of "definitional" balancing to socio-political speech by citizen journalists on the Internet would be ideal as the aggregate benefit of such speech is valuable to a society but it does move protection away from the individual and instead to a "class" of speakers.

In the context of UK, much of the balancing takes place between the competing interests between Article 8 and Article 10. The freedom of expression in Article 10(1) could be limited by the proviso in Article 10(2) through the approach set out in *Sunday Times*. The interference with Article 10(1) must be prescribed by law, the aim or aims must be legitimate and the interference was necessary in a democratic society. In the case of the last

requirement, the case of *Handyside* adopts the principle of proportionality whereby the states are left with a margin of appreciation.

The state of Malaysian freedom of expression is drastically different from that of the US and UK. The freedom of speech and expression is qualified by the proviso in Article 10(2) allowing provisions for the restriction of the exercise of the freedom of speech and expression. This has resulted in a severe erosion of the freedoms where multiple legislation have been enacted under the authority of the proviso that delegate wide powers of intervention to the Executive.

8.3 Public interest and responsible journalism

In addition to the above, the UK courts will have to undertake the balancing exercise in consideration of the public interest element as stipulated in Section 12 of the HRA. Public interest is raised in defence of intrusions into privacy, in the defence of fair comment and qualified privilege in defamation and is an essential element in the test of responsible journalism. Whilst the exercise of exhaustively defining public interest is a difficult one, it has been suggested by McQuail that perhaps it is better to consider its underlying values that is firstly, public interest is important in ensuring that the media carry out its function of disseminating information that is essential, informational and cultural; and that secondly, this function is carried out in abiding principles of efficiency, justice, fairness and respect for contemporary social and cultural values. In the review of decisions of the courts in Heading 5.5, the decisions where public interest has been raised have not provided for the legal boundaries of public interest but, save to say, the courts have said it should not be confined within narrow limits. The court in *Jameel* further stated that where the publisher of material is relying on the defence of qualified privilege on the basis that the publication was in the public interest, it extends to publication in any medium.

Citizen journalists on the Internet who are publishing information that is vital in the context of McQuail's definition and in abidance with the principles set out therein will be deemed to be serving public interest.

There seems to be sufficient guidance for the UK domestic courts from the European Court of Human Rights in the protection of political speech, when weighing up whether socio-political discourse by citizen journalists on the Internet carries a public interest element. Nevertheless, there are continuous debates on this area as reported as recently in Para 1.6 of the *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*.³⁰⁶

Currently, there is a vigorous on-going debate concerning the development of the law regarding privacy and freedom of expression in light of the HRA's enactment. That debate has a number of strands, some of which are: whether the courts have developed long-established forms of privacy protection appropriately since the HRA was enacted; whether they have struck the right balance between privacy and freedom of expression; whether they have properly applied and interpreted the public interest defence in favour of freedom of expression where privacy or confidentiality is in issue; and whether they have properly applied and interpreted the mandatory stress on freedom of expression, provided by HRA s12, when balancing Articles 8 and 10.

In the context of Malaysia, there has been recognition of the jurisprudence developed in *Reynolds* and *Jameel* and the application of the same in defamation cases. The Malaysian decisions in adopting the standards of responsible journalism have adapted the test to include the need to take into consideration the sensitivities of a multiracial and multi religious society.

The extrapolation of the test of responsible journalism to citizen journalism on the Internet will be discussed in Chapter 6.

8.4 Rights and privileges of journalists

Can citizen journalists partake in some of the privileges of journalists? If citizen journalists are functioning as journalists, can the privilege of confidentiality of sources be extended to

³⁰⁶ (n 235).

them? The challenge would be first and foremost, the recognition of citizen journalists as performing that journalistic function. If there is the recognition that citizen journalists are NOT professional journalists, it is suffice to say that they function as the latter and produce information that have journalistic value. Then, the second challenge would be to have such recognition permeate the legislation that accords such protection namely section 10 of the Contempt of Court Act in the UK and the state shield laws in the US. Further discussion on this point will be undertaken in Chapter 6.

The “open justice” principle position allows access to proceedings in courts, to not only journalists but the public. Members of the public with the web tools available to them are in a position to inform the rest of the public by publishing coverage of cases in courts. The ‘functioning as surrogates for the public’ is no longer confined to journalists. Has the law managed to catch up with this development? The “gag law” of injunction and super injunctions extends to the established media. It appears that the controversies surrounding “gag” orders seem to be confounded by the risks of speech on the Internet undermining Article 6. However, conversely, the practice of “open justice” in the era of web tools serve to ensure that parties’ rights to a fair trial under Article 6 is “seen to be done”.

Social media tools that have challenged prior restraint will require the US Supreme Court to revisit its entrenched decision in the *New York Times* case in balancing the right to free speech and the importance of national security as a result of the controversial leaking of military documents by *WikiLeaks*. However, if social media citizen journalists can satisfy the test of responsible journalism and public interest as per *Reynolds* and *Jameel*, which the later court has stated can apply to any medium, we could see the position of social media activity and citizen journalism entrenched in importance as a tool of news, discourse and democratic debate.

8.5 Professional Codes

Whether professional codes have an impact on increasing the accountability of journalists and press reporting depends on several factors. One of which is whether the breach of the code would result in a complaints procedure being invoked; whether the code is constantly

updated; and even whether the professional codes have been given some form of legislative recognition. In the case of the UK, the PCC code is considered as a code of practice under section 32 (3) of the Data Protection Act as a relevant code of practice when considering whether a publication could be in the public interest and therefore exempted from the data protection principles. The PCC code also sets out a complaint procedure and updates its code. As citizen journalists on the Internet are not organised by media groups and entities, embracing such a code on a voluntary basis would be more suitable. The US code which takes a soft-law approach and aims to provide a framework for ethical behaviour and not necessarily enforce it would appear more popular to citizen journalists on the Internet. In Malaysia, the media does not have an independent regulator.³⁰⁷ The professional union has a code that has no complaints procedures.

Citizen journalists who wish to be taken seriously, who wish for some recognition, to attract readership as credible bloggers and elevate their speech above the frivolous chatter of the rest of the blogosphere for instance, would consider such a code as achieving the same. Early suggestions that codes for bloggers for instance could be adopted from professional codes³⁰⁸ are viewed critically as these are viewed as being “journalistic” without regard to the interactive and human element of blogging.³⁰⁹ There is a need to prioritise what Kuhn refers to as “the human element”, in particular the need for anonymity and the need to negotiate between accountability and anonymity. Such codes are also difficult to operationalize as there is a lack of organisational structure of membership of bloggers. A model that is recommended is the adoption of a voluntary code by individual bloggers, where a blog will publish its own code of ethics comprising of good editorial practices and disclosure of principles and values held by the individual blogger.³¹⁰

³⁰⁷ The Malaysian Communications and Multimedia Commission is the executive regulator of the communications and multimedia industry established under the Malaysian Communications and Multimedia Commission Act 1998 and the Communications and Multimedia Act 1998.

³⁰⁸ Jonathan Dube, A Bloggers' Code of Ethics, Cyberjournalism.net, <http://www.cyberjournalist.net/news/000215_print.php> accessed 21 April, 2010.

³⁰⁹ Martin Kuhn, 'Interactivity and Prioritizing the Human: A Code of Blogging Ethics' [2007] 22(1) Journal of Mass Media Ethics 18, 20.

³¹⁰ Cecilia Friend and Jane B Singer, *Online Journalism Ethics* (ME Sharpe 2007), 123.

8.6 The case for Malaysia

The legal recognition of citizen journalists on the Internet in terms of rights that could be accorded to them essentially stems from media rights. When dealing with a legal system where the media has established rights, such as the US and the UK, the exercise of according citizen journalists with some form of recognition is built on these established rights. The challenge in protecting the rights of citizen journalists is that these rights cannot be built on any existing right or privilege that is accorded to the media as aside from the right to publish and distribute, there is little more in that regard. In the case of Malaysia, it is a case of filling the unfilled legal basin. A bottom-up approach needs to be taken in view of the insufficient development of jurisprudence related to media rights built on and derived from constitutional provisions namely freedom of speech and expression. Filling the unfilled legal basin must be constructed from building those rights for both established and recognised media entities as well as citizen journalists.

There needs to be a stronger development of the freedom of speech jurisprudence as seen in the US and the UK in the context of the realities of an increasingly well informed citizenry. In a media model that is increasingly decentralised as a result of social media actors on the Internet playing the role of alternative news providers and conduits for democratic discourse, the government, Parliament and the courts need to reengage with the social and political importance of the role discharged by the media both traditional and on the Internet. The courts' non-recognition of the importance of speech by media outlets is non-progressive to a citizenry that demands increased public speech and engagement.

Only when the constitutional principles of protection of free speech and expression are strengthened in Article 10(1) of the Federal Constitution through sound development of precedent by the apex court will the constitutionality of Acts of Parliament that erode that protection be called to challenge. A precursor to this is the recognition of the role of the media in a democratic state whereby a liberal and sophisticated media encourages or engages in socio-political dialogue, the exchange of ideas, opinions, recognizing the importance of executing this role for the benefits of the citizenry and the society at large. Upon a strong constitutional foundation, a review should be initiated with consideration of

some basic rights that ought to be accorded to the media such as, *inter alia*, the limitation of prior restraint, upholding the principle of open justice and the basis for the protection of confidentiality of sources. As the rights of mainstream media are developed, the citizen journalist on the Internet can then present a case for such rights to be extrapolated to protect citizen journalists who contribute through the publication of valuable speech in the socio-political context which is in the public interest of the people and provide accountable, responsible and credible citizen journalism on the Internet a legal leg to stand on.

The announcement of the Prime Minister on 16 September 2011 to review several pieces of legislation may be viewed as a step in the right direction in liberalizing the media. The draconian detention-without-trial legislation, the Internal Security Act was abolished and replaced by the Security Offences (Special Measures) Act 2012 on 22 June 2012 which does away with detention-without-trial and restricts detention to a maximum of 28 days for the purposes of investigation. The Printing Presses and Publications Act 1984 was amended by the Printing Presses and Publications (Amendment) Act 2012 on 22 June 2012. The amendments to the older Act are progressive in nature and which include the removal of the absolute discretion of the Minister in granting of the permit to print and publish a newspaper,³¹¹ the licence to publish which required an annual renewal will remain valid for so long as it is not revoked³¹² and the right to be heard which was expressly excluded has been explicitly included before a decision to revoke or suspend a licence is made.³¹³

However, on the very same day the above amendments were gazetted, legislation in the form of an amendment to the Evidence Act 1950 introducing a “Presumption of fact in publication” was gazetted. The inclusion of the Section 114A, as discussed *supra*, has been seen as a mechanism to silence social media activity on the Internet and is aimed to have a chilling effect on citizen journalism on the Internet.

³¹¹ Section 3 of the Amendment Act amends section 6(1) of the 1984 Act.

³¹² Section 4 of the Amendment Act amends section 12 of the 1984 Act.

³¹³ Section 6 of the Amendment Act amends section 13B of the 1984 Act.

Chapter 6

Issues Affecting Citizen Journalists on the Internet

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1. Introduction

In the previous chapter, the thesis highlighted the scope of freedom of speech and expression and the rights and responsibilities arising therefrom which apply to the media, and the extension of these rights and responsibilities to citizen journalism on the Internet.

One of the points discussed in this chapter and central to the thesis is if citizen journalists are to be given the same or equal rights as professional journalists, the preliminary question to be asked and answered would be whether they are ‘journalists’? It is therefore essential to enquire how the law, both legislation and the case law, recognizes the ‘journalist’. If the citizen journalist on the Internet is performing the function of a journalist, can s/he resort to the same protection the law accords, such as shield laws, to journalists attached to mainstream traditional media entities? Following from this, a further question that will require discussion, to be addressed in the Conclusion chapter, is whether a blogger would benefit from being labelled as a journalist or whether it would impose restrictions and limitations on the citizen journalist?

The chapter will also enquire into the need to consider and devise new legal norms in relation to citizen journalism on the Internet, different from those applied to professional journalists, in particular in reference to anonymity of the citizen journalist and the citizen journalist as a confidential source. The importance of anonymity is essential in protecting the identity of citizen journalists from being revealed. The cloak of anonymity that the Internet provides encourages democratic discourse. If anonymity is removed, it is likely to impede the activity. If the right to expression and speech hinges on the right to privacy and anonymity, the protection of the latter becomes essential. On the point of citizen journalists being treated as confidential sources, the consideration of the question whether the citizen journalist who wishes to write under the cloak of anonymity could be protected as a confidential source when the citizen journalist is functioning both as a journalist and a source of the information places a new spin on the way confidential sources of journalists are treated under the law.

The chapter will begin with a case study which raised the above questions in the UK.

2. The case of the silenced blogger – *NightJack*

The case of *The Author of a Blog v Times Newspaper Limited*¹ (hereinafter referred to as ‘*NightJack*’s case’) involved the author, *NightJack*, who brought an application for an interim injunction in the Queen’s Bench Division of the High Court to restrain the defendant, Times

¹ [2009] EWHC 1358 (QB).

Newspapers Limited, from revealing his identity in a news article.² As mentioned in Chapter 4, a journalist of *the Times*, Patrick Foster, had apparently deduced the real identity of *NightJack* through ‘a process of deduction and detective work, mainly using information available on the Internet’ as being the pseudonym used by Detective Constable Richard Horton of the Lancashire police.³

The blog which has since been silenced⁴ gave opinions on police work and ‘on a number of social and political issues relating to the police and administration of justice’⁵ and provided a ‘behind-the-scenes commentary on policing’.⁶

It was argued on *NightJack*’s behalf that he had blogged responsibly by taking particular care in disguising the information and not commenting on pending and active cases within the meaning of the Contempt of Court Act 1981 nor flouting any court reporting restrictions.⁷

Relying on the UK case of *Mahmood v Galloway & McKay*,⁸ one of the arguments proffered by the Defendant in *NightJack*’s case was that ‘a journalist who writes under a pseudonym for the purpose of functioning more effectively in his undercover work has no reasonable expectation of privacy in respect of his identity’ if it is later revealed through the publication of photographs and hence, similarly in *NightJack* he had no such right.⁹

The ruling by Justice Eady that *NightJack* could not have a reasonable expectation to anonymity was premised on the fact that ‘blogging is essentially a public rather than a private activity’¹⁰. *NightJack*’s ability to write the blog relied on the fact that concealing his identity enabled him to communicate without inhibitions and any negative retaliation from

² *NightJack*’s identity was revealed in an article written by Patrick Foster in *The Times* on 17 June 2009.

³ (n1) [3]. It was later discovered that this was not true. On 17 January, James Harding, the Editor of *the Times*, gave evidence to the Leveson Inquiry that Foster had to be disciplined as it had transpired that Foster had hacked into Richard Horton’s emails. Foster was arrested on 29 August 2012 on suspicion of hacking into Horton’s emails.

⁴ Archives of the blog can be found at <<http://nightjack2.wordpress.com/>> and <<http://nightjackarchive.blogspot.com/>> accessed 28 July 2012.

⁵ (n 1) [13].

⁶ Afua Hirsch, ‘Publish and be named: Police blogger NightJack loses anonymity’ (*The Guardian*, 16 June 2009) <<http://www.guardian.co.uk/media/2009/jun/16/nightjack-blogger-horton>> accessed 28 July 2012.

⁷ (n 5).

⁸ [2006] EMLR 26.

⁹ (n 1) [10].

¹⁰ (n 1) [11].

colleagues, his employer or individuals he came in contact with during the course of his work. *NightJack* submitted that ‘*The Times* is subject to an enforceable duty of confidence not to reveal the claimant’s identity as the author of the blog; alternatively, that he has a reasonable expectation of privacy in respect of that information, where there is no countervailing public interest justification for its publication’.¹¹

His argument was that he had a reasonable expectation of privacy and therefore of not having his identity revealed.¹² He had also taken steps to preserve his anonymity¹³ and argued that there was a public interest in preserving the anonymity of bloggers in these circumstances – in the manner and nature of information published on *NightJack*’s blog. These steps evidenced that Horton cherished his privacy where his conduct in not revealing his true identity could be drawn from the fact that he refused interviews, a book deal and he sent a representative in his place for receiving his Orwell Prize award.

NightJack’s identity was already known to his employers prior to his identity being revealed to the world through the publication of Foster’s article in *the Times*.

In drawing the analogy of the anonymous authorship of a blog to that of a journalist working under a pseudonym, Justice Eady stated that although the claimant, a blogger who published on his blog under the pseudonym *NightJack*, was not a journalist, he performed, via his blog, a function that was closely analogous to that of a journalist.¹⁴ This is the first explicit recognition by the courts in the UK that the activity of blogging need not always be an activity of navel-gazing armchair speculation by amateur citizen journalists.

The case of *NightJack* will be re-visited in the course of this chapter in order to answer the following questions raised from the facts and decision of this case:

Could citizen journalists on the Internet, such as the blogger *NightJack*, be seen as carrying out a journalistic function where their writing is of a socio-political nature and is of public interest?

¹¹ (n 1) [2].

¹² *ibid.*

¹³ (n 9).

¹⁴ (n 1) [10].

Do citizen journalists on the Internet writing under a pseudonym have reasonable expectation of privacy if disclosure would impede their journalistic function as this would not serve the publication of information of public interest?

Could citizen journalists on the Internet be protected under the freedom of speech and expression similar to the protection accorded to traditional mainstream media if they demonstrate the traits of responsible journalism such as accountability and credibility in the manner in which their information is published?

Could citizen journalists on the Internet be protected as confidential sources and enjoy the protection of non-disclosure if they act as both the source and the journalist?

3. Citizen Journalists on the Internet as Journalists

The consideration of whether citizen journalists on the Internet can be treated as journalists is important for two reasons. Firstly, if citizen journalists on the Internet such as bloggers, or more specifically, a particular category of bloggers, perform the function of journalists, it will place into context the importance of such activity. Secondly, it will raise the need to address the issue of the extension of the rights enjoyed by journalists to citizen journalists on the Internet.

3.1 Who is a journalist?

Who is a journalist or what is journalism? The question takes us back to the discussion in Chapter 3. The definition seems to be a static one. Through time, it has been recognized that journalism has had a range of communication styles and has always had diversity. The word 'journalism' was introduced into the English language from the French in the 1830s. However, before the word was introduced, 'practices and traditions of this form of public communication had been well established'.¹⁵ The key thing to note is that journalism has always evolved in function from reporting events, to publishing opinion, reporting news and in gaining ground in social and political thought.¹⁶ Revisiting the discussion in Chapter 3, the medium has also evolved from pamphlets, newsletters, to newspapers and now the Internet.

¹⁵ Martin Conboy, *Journalism: A Critical History* (SAGE, 2004) 1.

¹⁶ *ibid* 1-2.

The definition of journalism is vital as pointed out by the US Supreme Court in *Branzburg v Hayes*¹⁷ where the court commented that in applying the privilege of non-disclosure of confidential information, it was 'necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.' In *Branzburg*, the Supreme Court observed, by quoting *Lovell v. Griffin*¹⁸ that:

...freedom of the press is a 'fundamental personal right . . . not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'

Similarly today, in relation to speech on the Internet, the Supreme Court observed in *Reno v. American Civil Liberties Union*¹⁹ when addressing the issue of free speech rights on the Internet, that any person can become the "town-crier" or a pamphleteer.²⁰ Will the courts recognise writing of a socio-political nature published on social media platforms such as blogging as having intrinsically a similar character and function to journalistic writing? The history of the media informs us that similar development of new forms of speech, such as pamphlets which were considered non-mainstream or non-conventional but seen as having journalistic attributes, had a considerable impact on socio-political discourse.

Socio-political blogs can be seen in the same light as having journalistic attributes – a publicly accessible medium of communication and having an authoritative voice in the national conversation. The *Huffington Post* and the *Drudge Report* in the US, for instance, attract a readership and popularity similar to that of mainstream newspapers. In its evolution, journalism is at the corner of another milestone where perhaps the acceptance of a new form of journalism is seeing its turning point.

¹⁷ 408 US 665 (1972) 704.

¹⁸ 304 US 444 (1938) 450, 452.

¹⁹ 521 US 844 (1997).

²⁰ *ibid* 870.

Do the courts recognise journalism as a skill, a function or a profession, or a combination of all? Robertson and Nicol speak of journalism as not just a profession. They comment that: 'It is the exercise by occupation of the right to free expression available to every citizen. That right being available to all, cannot in principle be withdrawn from a few by any system of licensing or professional registration, but it can be restricted and confined by rules of law that apply to all who take or are afforded the opportunity to exercise the right by speaking or writing in public'.²¹ It is essential to distinguish journalism, its function, aims and objectives, and the value it provides to the public from other types of media products in order for the law to give it protection or to extend certain rights to it such as confidentiality of sources and the right court proceedings, as raised in Chapter 5. As aptly recognised by Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd*, as mentioned in Heading 5.2 in Chapter 5, the role of the media is as the conduit for the participation of citizens with the state in discussions and decisions which shape the public life and to alert and inform the public on matters which call or may call for consideration and action by citizens.²² If 'a' source of information, regardless of the form it takes, plays the same function and fulfils the same aims and objectives, carrying a value akin to a journalistic one – then the law is to accord it the same protection or cloak it with the same rights. There have also been decisions of the UK courts and the European Court of Human Rights suggesting that the rights enjoyed by journalists extend beyond the profession and these will be discussed later under this section.

3.2 Extending reporter's privilege to citizen journalism

The definition of who is a journalist is important in light of the extent of protection that is accorded by the law. For instance, in the United States, shield law in a variety of states limits the protection of the reporter's privilege of the right not to reveal confidential sources 'to full time employees of established mainstream media entities' It has however, been suggested that the courts will have to consider the scope of extending reporter's privilege to online publications involving non-professionals owing to the development of the Internet

²¹ Geoffrey Robertson and Andrew Nicol, *Media Law* (5th edn, Penguin 2008) p xvii.

²² *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at pp 290 – 291.

and online publications.²³ This is particularly the case when the non-professional is publishing information of journalistic value.

Owing to the changing nature of journalism, Papandrea²⁴ puts forward the argument that the reporter's privilege enjoyed by professional journalists should extend to citizen journalists as part of the "shield law". The origins of this law are found in the First Amendment. However, one of the stumbling blocks for the US Congress in attempting to legislate federally on this law has been to define the scope of who would be entitled to invoke the privilege. Papandrea comments that just because there are difficulties in identifying who should be entitled to the privilege in the context of new media should not doom the privilege's very existence as the "struggle" in defining who is entitled is not a new challenge. This challenge has often been faced by both legislatures and courts alike. It is argued that the focus in this debate should rather be the underlying purpose of the privilege which is to increase the flow of information in encouraging and protecting open communication including the identity of confidential sources of this information.

The UK courts, prior to *NightJacks's* case, have not had an opportunity to consider directly whether bloggers or social media actors as such could or should be regarded as journalists. There has been however, some consideration of the point in the US. Judge David Sentelle of the US Court of Appeals for the District of Columbia, in *Re Grand Jury Subpoena, Judith Miller* addressed the issue as to who could enjoy the privilege of shielding confidential sources. To illustrate this difficulty, he put forward the question whether bloggers could be considered as journalists who could claim this privilege. Judge David Sentelle acknowledged the challenge of crafting a common law privilege for reporters, the problem of defining a journalist and whether such a definition could include a blogger. He sought guidance from the state legislatures dealing with entitlement to the said privilege. The scope of the legislation ranged from "quite restrictive" where the privilege is limited to the "established" press, to the "quite inclusive" where the "medium of communication" and persons

²³ Mary-Rose Papandrea, 'Citizen Journalism and the Reporter's Privilege' (2006-2007) 91 Minn L Rev 515, 517.

²⁴ *ibid.*

protected is widely defined.²⁵ Inclusive state legislation such as that in Nebraska is wide enough to protect the lonely pamphleteer of today, the blogger. The rationale for the “inclusive” attitude as seen in the State of Nebraska statute is ‘to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere’ and that ‘such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed.’²⁶

State legislation which can be viewed as restrictive is that of Alabama, Alaska, Arizona and Arkansas. The legislation clearly limits its protection to the reporter who is employed by a media entity that represents the established press. The Alabama legislation mentions ‘person[s] engaged in, connected with, or employed on any newspaper, radio broadcasting station or television station, while engaged in a newsgathering capacity.’²⁷ Alaska is more specific in extending protection to a ‘reporter’ who is a ‘person[s] regularly engaged in the business of collecting or writing news for publication or presentation to the public, through a news organization.’²⁸ Similarly in Arizona, the legislation protects ‘a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper or radio or television station...’²⁹ and in Arkansas to ‘any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station...’.³⁰ The most specific of this type of legislation is found in the State of Delaware where a ‘reporter’ is defined as:

...any journalist, scholar, educator, polemicist, or other individual who either: (a) At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3

²⁵ 397 F 3d 964 (DC Cir 02/15/2005) 980.

²⁶ Nebraska Revisited Statute § 20-144.

²⁷ Alabama Code § 12-21-142.

²⁸ Alaska Statute § 09.25.300.

²⁹ Arizona Revisited Statute § 12-2237.

³⁰ Arkansas Code Annotated § 16-85-510.

weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or (b) Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.³¹

One of the most inclusive of the state legislation is that of the State of Nebraska which has a strong policy that indicates the importance of the provisions for the privilege.³² The provision extends its protection to any “medium of communication” which ‘shall include, *but not be limited to*, [emphasis added] any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.’³³ The protected person widely includes ‘...any individual, partnership, limited liability company, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country’³⁴.

As Judge Sentelle commented the legislation of the State of Nebraska was ‘more in keeping with the spirit of the recent revolutionaries who gave us the First Amendment, protects the pamphleteer at the rented printer, and the blogger at the pc, as well as the giant corporation with its New York publishing house.’³⁵ There is clear potential of acceptance by legislators for the extension of the rights of the press to citizen journalists on the Internet

³¹ Delaware Code Annotated. Title 10 § 4320.

³² (1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere; (2) That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed. See Nebraska Revisited Statute § 20-144§ 20-144.

³³ Nebraska Revisited Statute § 20-144§ 20-145(2)

³⁴ Nebraska Revisited Statute § 20-144 § 20-145(7)

³⁵ (n 25) p 988.

but it also evidences a clear division on the position of state legislators on the acceptance of non-mainstream media enjoying the said privilege.

3.3 Consideration of the nature of citizen journalism being different from professional journalism

The reluctance of extending the right of traditional journalists to citizen journalists on the Internet by legislators could be an indication that they are acting cautiously. The citizen journalist utilising the Internet has distinguishable traits from the professional journalist – discussed in Heading 3 of Chapter 4. In *NightJack's* case, Justice Eady made reference to the case of *Mahmood v Galloway & McKay*.³⁶ Whether *Mahmood's* case was relevant authority for Justice Eady to rely on in *NightJack's* case turns on the question whether the facts of that case, where the investigative journalist's identity was revealed through the posting of his photographs on a website, were distinguishable to *NightJack's*. The main similarity between both cases was the disclosure of their identities resulting in their impaired ability to perform their activities effectively whether as a blogger or an investigative journalist. However, distinction of an activity as part of a profession and an activity that is the right to speech by a citizen requires different treatment. A social media actor does not have the machinery as would a professional journalist available to him/her or the skill or the sources and more importantly, partakes in social media activity as an extension of his full time job or vocation or merely as a concerned citizen, generally without payment of a wage and with a different motivation, as discussed in Heading 3 of Chapter 4, to highlight and discuss socio-political issues.

Even if *NightJack* was performing a function that was analogous to that of a journalist, the nature of sourcing the information relayed to the readers of his blog was unlike that in *Mahmood's* case. *NightJack* did not don different identities in carrying out his job. As a police officer, his job was the main source of information and commentary on his blog and neither was he employed by a media organisation. Justice Eady chose his words carefully but as stated in Heading 2, it is the closest explicit legal recognition in the UK that the activity of blogging has had to that of a journalist. The court had certainly taken cognizance

³⁶ (n 25).

of the nature of *NightJack's* blog³⁷ and recognised the political nature of the blog.³⁸ It is unlikely that the court would have made that observation in relation to all types of blogs or blogging in general owing to the varied nature of blogging. The observation made by the judge could have been made by drawing from the journalistic value of the speech made. But consideration of the nature and value of the speech and writing is vital to accord protection to this kind of speech in the similar way in which speech made by the press or media are treated. This discussion to a large extent brings us to the centre of the real debate of whether bloggers who blog on issues of public interest can be seen as performing a journalistic function. Are the present laws, which accord protection to journalists, capable of providing similar protection to bloggers?

3.4 Organisations of the Profession and Citizen Journalism

How do the organisations who look out for the interests of journalists view citizen journalism on the Internet? From the myriad of organisations and institutions that engage with journalism and the media industry, the perception and opinions differ. The UK's National Union of Journalists (hereinafter referred to as '*NUJ*') opens its membership to anyone who works 'in editorial, design or photography in newspapers, magazines, books, tv, radio, public relations or *new media* [emphasis added] as an employee or as a freelance...'.³⁹ The words 'employee or as a freelance' suggests a work or contractual relationship. On its website, the union provides information on 'New Media'. It reads as follows: 'If you are a journalist working in new media the *NUJ* is the union for you...Our members in new media write content, sub or edit websites, blogs and text messaging services or supply photographs for the Internet among other things. You may be doing this within any number of media sectors - broadcasting, magazines and books, newspapers, public relations or for a news agency, or independent new media platform. Wherever you work you are welcome in the *NUJ*.' The use of the word 'work' suggests an element of monetary gain of a contractual nature. In 2007, the *NUJ* admitted into its membership for the first time, a full-time freelance blogger who wrote for a tech site. In an article published in the *Guardian*, the *NUJ*'s General Secretary, Jeremy Dear commented that bloggers were also interested in

³⁷ (n 5).

³⁸ (n 1) [24].

³⁹ See *National Union of Journalists* <www.nuj.org.uk> accessed 8 July 2012.

protecting journalistic standards.⁴⁰ But what was clear from his commentary was that membership would not extend to *any* blogger. He added that ‘not all people who blog are journalists, but journalists who are bloggers should be encouraged to join.’ His reference was indicative of the scope of persons to whom membership could be extended to and that his reference to the ‘profession’ suggests that the blogger has to be a professional journalist who has had either training or experience in journalism and using the medium of blogging for which s/he is remunerated.

The *BBC School of Journalism* website was discussed in Chapter 4 in reference to its dedicated section on citizen journalism. To add, the website claims that self-publishing tools on the Internet have removed the two main impediments that citizens faced in becoming journalists. The said two barriers are cost of publication and barriers to publication. The website goes on to provide a *Citizen Journalism Guide* with advice on how to start out as a citizen journalist, the social media tools available and the ethical and legal issues that citizen journalists have to consider. The advice on ethics hinges on trust and that anyone who works as a journalist needs to be trusted. This added emphasis to the quote on the opening page of the section of the website which read – ‘Journalism that doesn’t aspire to the values of accuracy, impartiality, independence and public interest is just noise. Or worse.’⁴¹ It is evident that an institution such as the BBC views citizen journalism as an important activity contributing to the news so as to warrant a site to give advice, to improve and to encourage it. These initiatives also serve the interests of the BBC as its online website practises participatory journalism engaging with users on stories, comments and opinions. Users who are educated in ethical and legal issues of reporting will only serve to elevate the quality of user interaction and contribution.

The UK Press Complaints Commission, the *PCC* for short, discussed in Chapter 5, imposes ethical standards in media and journalism. Baroness Buscombe, the Chairman of the *PCC*, commented that since the blogosphere was increasingly becoming a source of breaking news which attracted high profile commentators, examining the possibility of the *PCC*

⁴⁰ Jeremy Dear, ‘Bloggers of the world, unite’ (The Guardian, 17 December 2007) <<http://www.guardian.co.uk/profile/jeremydear>> accessed 28 July 2012.

⁴¹ Citizen Journalism Guide, BBC <<http://www.bbc.co.uk/journalism/skills/citizen-journalism/citizen-journalism-guide/ethics.shtml>> accessed 11 January 2012.

extending its role to the blogosphere may be undertaken.⁴² She commented, 'Some of the bloggers are now creating their own ecosystems which are quite sophisticated...Is the reader of those blogs assuming that it's news, and is [the blogosphere] the new newspapers?' The inclusion of bloggers for instance she added would be on a voluntary basis. Buscombe received harsh criticism from several established bloggers who felt that that the blogosphere would not benefit from PCC regulation. In a letter to Buscombe, the claim was premised on the fact that the code of practice was only seen as 'no more than standard operating practice' and that it had in essence failed to raise 'ethical standards and practices of the majority of the national press, particularly the tabloids...'.⁴³ The comment made by Buscombe that the blogosphere could be the new newspaper and the new source of news is recognition that the blogosphere could be seen to have journalistic value and thus should also carry the duty of abiding by rules of responsibility and accountability as do other members of the profession.

3.5 Citizen journalists-bloggers who write on issues of public interest as performing a journalistic function

By reading Article 10 of the ECHR and extending the role of the press or traditional media, as per Lord Bingham in *McCartan Turkington Breen v Times*, discussed in Heading 5.2 in Chapter 5, to new media or social media, citizen journalism on the Internet can be viewed as an exercise of the right to freedom of expression, to hold opinions, receive and impart information in view of the present when any individual has the ability to participate directly in the discussions and decisions which shape the public life of society. Blogs and other forms of platforms that allow UGC to be placed, for instance on a news piece of a news website, are just some of the instances where the individual has been able to do this and contribute to the 'proper functioning of a modern participatory democracy' which Lord Bingham speaks of and that any restriction therefore on such expression must be proportionate and 'no more than is necessary to promote the legitimate object of the restriction'.

⁴² Roy Greenslade, 'Bloggers strike back at Buscombe' (*The Guardian*, 18 November 2009) <<http://www.guardian.co.uk/media/greenslade/2009/nov/18/peta-buscombe-pcc?INTCMP=SRCH>> accessed 7 March 2011.

⁴³ *ibid.*

As discussed in Heading 5.2 in Chapter 5, the types of expression that are broadly protected under Article 10 fall into three categories – political, artistic and commercial expression. In the context of the socio-political blogging, the most relevant type is political expression which covers, in general, matters of general public interest. If Article 10 requires for instance a public interest defence to exist to preserve the spirit of Article 10, would it be plausible to proffer the same argument to merit protection of citizen journalists on the Internet if they contribute to public discussion on matters of public importance? When considering the decision of the European Court of Human Rights decision in *Lingens v Austria*,⁴⁴ Robertson and Nicols commented that the defence is required when publishing criticisms of politicians and government figures and without such a defence, it 'would deter journalists from contributing to public discussion of issues affecting the life of the community'.⁴⁵ The court in *Lingens* set out the importance of freedom of expression as constituting one of the essential foundations of a democratic society but emphasized that it was 'incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest' and in doing so, it must not overstep the bounds set for the 'protection of the reputation of others'. The court went on to add that the role of the press in imparting such information was tied in with the public's right to receive it.

Could the courts rely on the public interest argument to extend protection to citizen journalists on the Internet in the same way as journalists are protected when facing libel suits? Could a citizen journalist on the Internet facing a libel suit claim this defence if s/he is able to satisfy the test of responsible journalism as per the 10 indicia test in *Reynolds* and the add on effect of *Jameel*?⁴⁶

Lord Nicholls indicators in deciding the factors to be taken into account are:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information.

⁴⁴ (1986) 8 EHRR 407.

⁴⁵ (n 21) 158.

⁴⁶ [2005] EWCA Civ 74, [2005] 4 All E.R. 356.

Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.⁴⁷

The indicia requires credibility and veracity in the information – the manner in which it is obtained and published and the information published must be have certain values – of public concern and timeliness. Lord Nicholls's 10 indicia test is in no certain terms exhaustive as confirmed by His Lordship and by both Lord Bingham and Lord Hoffman in *Jameel*. Lord Bingham refers to them as 'certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied' adding that Lord Nicholls 'intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case' but His Lordship pointed out these were not to be seen 'as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege'.⁴⁸ Lord Hoffman refers to them as an 'offered guidance in the form of a non-exhaustive, illustrative list of matters which, depending on the circumstances, might be relevant'.⁴⁹ And as Lord Nicholls puts it in *Reynolds*, that: 'Over time, a valuable corpus of case law will be built up.'⁵⁰

⁴⁷ [2001] 2 AC 127, 205.

⁴⁸ [2005] EWCA Civ 74, [2005] 4 All ER 356, [33].

⁴⁹ [2005] EWCA Civ 74, [2005] 4 All ER 356, [47].

⁵⁰ [2001] 2 AC 127, 205.

On a ruling of the availability of the defence of privilege, in the case of *Malik v. Newpost Ltd & Ors*,⁵¹ several of Justice Eady's comments allow some headway to be made in respect to the question of extending the defence of "public interest" to bloggers. When referring to the possibility of extending the *Reynolds* privilege to the publication of a letter, Justice Eady stated that '...it is necessary to have regard to the broader issues of public policy upon which are founded, not only the defence now associated with the *Reynolds* case, but also the closely related public interest privilege...'⁵² suggesting that the *Reynolds* privilege could apply as much to a letter writer as it would to a journalist. The court added that:

Sometimes it may be in the public interest for allegations to be generally disseminated through the media by means which cannot be labelled as investigative (or indeed any other form of) journalism.⁵³

And more importantly the judge's following remarks:

It is possible to conceive of circumstances where it is the information itself, and the public interest in receiving it, that is important rather than the means of conveying it [emphasis added].⁵⁴

The comment seems to suggest that the source of the information is not essential but it is that information itself and it is the information that needs to be viewed as a matter of public interest. According to Justice Eady, the kind of publication that may enjoy privilege will have 'to be in the public interest (irrespective of truth or falsity), then a social or moral duty to impart the information can be assumed'.⁵⁵ The task of according protection to certain types of speech therefore does not hinge on the categorisation of the profession of persons who may enjoy that protection such as journalists but rather on the information or news or statement in that speech. The rights are therefore not pegged to the person making the speech but rather the nature of the speech and the right of the public to 'hear'.

⁵¹ [2007] EWHC 3063 (QB).

⁵² *ibid* [8].

⁵³ (n 51) [9].

⁵⁴ *ibid*.

⁵⁵ (n 51) [13].

But Justice Eady cautions that there have to be ‘safeguards in the interests of fairness and the protection of reputation.’ If the information that is conveyed on socio-political blogs or any social media platform has a public interest value, then protection of the said information should be accorded it premised on the proposition in *Reynolds* and the exposition in *Jameel*. As mentioned in Heading 5.5.3 in Chapter 5, Lord Hoffman had added in *Jameel* that whilst Lord Nicholls was speaking in the context of a publication in a newspaper, Lord Hoffman extended the defence to be available ‘to anyone who publishes material of public interest in any medium.’⁵⁶

The consideration by the Supreme Court of Canada in *Grant v. Torstar Corp.*,⁵⁷ when propounding the “public interest” defence as a new defence, citing amongst other cases, the decisions of the House of Lords in *Reynolds* and *Jameel*, can be instructive. Chief Justice McLachlin considered when a publication is a matter of public interest:

To be of public interest, the subject matter must be shown to be one inviting public attention, or about which the public, or a segment of the public, has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached. Public interest is not confined to publications on government and political matters, nor is it necessary that the plaintiff be a ‘public figure’.

Again the court’s emphasis on publication that can be cloaked with the public interest defence pivots not on the source of information but the characteristics and nature of the information relayed.

There seems to be some progressive thought that the areas of privilege once enjoyed by the traditional mainstream media should extend to a wider category of information and news sources. In the US, there was a legislative proposal to accord protection under a federal shield law – a move from the current position where the shield law provisions are served up by individual states. On 15 December 2009, the Senate Judiciary Committee passed the

⁵⁶ *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44, [54].

⁵⁷ 2009 SCC 61 (paras 105 and 106).

Senate shield bill.⁵⁸ Although the said bill never saw the light as law as its passage through Congress could not be completed owing to the end of the session of Congress, the provision in the bill makes a strong statement of the legislative will of the Senate to take a step towards a federal shield law and, more relevant to the discussion, broaden the category of persons who would enjoy the privilege. The title of the proposed legislation was the *Free Flow of Information Act of 2009*. The law defined broadly persons who fell under the protected class as any ‘covered person’ who engages ‘with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes...’ *Reporters without Borders* believes that the ‘bill’s current definition extends its protection to bloggers, freelancers and any other person involved in disseminating information to the public.’⁵⁹ The definition of ‘covered persons’ is inclusive of bloggers or any individual for that matter who is in the business of disseminating information to the public utilizing any technologically facilitated platform as long as the scope of activity carried out by them has the necessary characteristics set out in the definition.

The closest a court in the US has come to recognize a blogger as a journalist was the California Court of Appeal, Sixth Appellate District in *O’Grady v Superior Court*,⁶⁰ which, in response to the argument that bloggers were not “legitimate” journalists and hence had no right to protection of shield law, commented:

We decline the implicit invitation to embroil ourselves in questions of what constitutes “legitimate journalis[m].” The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here. We can think of no workable test or principle that would distinguish “legitimate” from “illegitimate” news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any

⁵⁸ Bill number s 448.

⁵⁹ ‘Federal Shield Law Passes Senate Judiciary Committee’ (*Reporters without Borders*, 15 December 2009) <<http://www.rsf.org/Federal-Shield-Law-Passes-Senate.html>> accessed 28 July 2012.

⁶⁰ 139 Cal App 4th 1423 (Cal App 2006)

sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.

Flanagan⁶¹ submitted that if bloggers are to be recognised as journalists, it is vital that they stand up to the rigour of the “journalistic process” test. In prescribing some standards from where this test can be formulated, Flanagan seeks guidance from the 10 indicia-test in *Reynolds*, discussed earlier and the PCC’s Code of Practice.⁶² The test in essence requires that the information is verified and a range of factors are considered prior to publications such as, to name a few, the intrusion into the privacy of individuals or the methods used in obtaining the information.

The PCC’s Code of Practice although being an industry code provides a benchmark of ethical standards for this test and as the Code claims, in protecting both the rights of the individual and the public’s right to know. The code is an “evolving code” which is written and amended by a committee of editors and ratified by the Commission, with the most recent update ratified in January 2012.

In *NightJack’s* case, discussed in Heading 2 *supra*, there was a high degree of compliance with several of the indicia in *Reynolds* and the provisions of the code.

In considering whether bloggers are journalists, apart from considering the value of the information being of journalistic value, particularly in the public interest category, there must also be an additional consideration whether the blogger has performed the function of a journalist. One of the essential elements in professional journalism is the need for testing the integrity of the information by utilising the ‘journalistic process’ test. There is no dispute that the value of information on the blog had public interest value clearly satisfying the requirements that this was the type of speech that the First Amendment of the US Constitution and Article 10 of the European Convention of Human Rights was seeking to promote and protect. Returning to *NightJack’s* case, not only did the information have journalistic value with the writing encompassing a commentary on social and political issues

⁶¹ Anne Flanagan, ‘The blogger as journalist under UK law’ (2005) 10(4) Comm Law 125.

⁶² See Editor’s Code of Practice, Press Complaints Commission <<http://www.PCC.org.uk/cop/practice.html>> accessed 28 July 2012.

in relation to police work and administration of justice which the detective had first-hand exposure and knowledge of but also that *NightJack* carried out his blogging no differently than how a journalist would have done in ensuring that an appropriate journalistic process was adopted.

If citizen journalists on the Internet are to be seen as having the potential of falling within the definition of a journalist, they would have to present themselves as the facilitator of freedom of expression akin to the role played by the media. In order to enjoy the public interest defence, citizen journalists on the Internet will have to satisfy the responsible journalism test and the information relayed must have carry an element of public interest value.

4. Protecting the Anonymity of Citizen Journalists-Bloggers

How important is anonymity to bloggers? The US “marketplace of ideas” discussion may help in this enquiry. Justice Oliver Wendell Holmes in his dissent in *Abrams v United States*⁶³ argued that society’s ultimate good is better reached by free trade in ideas and ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market.’ Anonymity is important in promoting freedom of speech and expression as recognized by the US Supreme Court in *N.Y. Times Co v Sullivan*⁶⁴ as it makes public discussion more ‘uninhibited, robust and wide-open.’ Lidsky and Cotter suggest that whilst disclosure of identity may add credibility, anonymity may allow the author to avoid negative consequences of wrongful retaliation. This will encourage contribution to the marketplace of ideas as it eliminates barriers to speaking and listening allowing the inclusion of voices in public debate that might not otherwise be heard.⁶⁵ In the context of the Internet as a medium facilitating speech, the credibility issue can be reinforced over a period of time by repeatedly relaying credible news and information. So even if the source of the news writes with a pseudonym, the news itself is valued for its credibility. Anonymity and pseudonymity defeat presumptions based on perceived status or, as the case may be, the lack of status, of

⁶³ 250 US 616 (1919).

⁶⁴ 376 US 254 (1964) 270.

⁶⁵ Lyrissa B Lidsky and Thomas F Cotter, ‘Authorship, Audiences and Anonymous Speech’ (2006) 82 Notre Dame Law Review 1537, 1570-1573.

the speaker, reinforcing the view that it is the speech or information published that is important and valuable and not the speaker.

The removal of barriers encourages citizens to speak out against, and check abuses of, powerful organizations, corporations and governments. The fear of being named may be real to the individual and as the US Supreme Court pointed out in *McIntyre v. Ohio Elections Commission*,⁶⁶ the ‘decision in favour of anonymity may be motivated by fear of economic or official retaliation.’

Drawing a historical link to the tradition of anonymity in the UK, anonymous pamphlets have been produced in England from the beginning of print.⁶⁷ In the Internet and Web 2.0 era, use of pseudonyms has become the norm in blogging and micro-blogging sites. In the UK, the decision of Justice Eady in *NightJack*’s case raised fundamental questions surrounding the arguments in the protection or disclosure of a blogger’s identity.

In the US, anonymous speech became increasingly prominent in order to avoid SLAPP (an acronym for ‘Strategic Lawsuits Against Public Participation’) suits, a phenomenon which appeared in the 1970s where the aim of such suits is to deter citizens from public participation in voicing their opinions on matters of public concern and interest.⁶⁸ Internet speakers have used anonymity to avoid being sued in SLAPP suits but where there is a *prima facie* case of liability arising from defamatory statements or disclosure of confidential information, the courts have issued disclosure subpoenas.⁶⁹ The basis for disclosure is relevant in the discussion on grounds of accountability. The ruling by Justice Eady that *NightJack* could not have a reasonable expectation to anonymity premised on the fact that ‘blogging is essentially a public rather than a private activity’⁷⁰. But does the question in protecting anonymity turn on privacy or is it rather about promoting or at least not inhibiting freedom of expression or both?

⁶⁶ 514 US 334 (1995) 341.

⁶⁷ Comment, ‘The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil’ (1961) 70 Yale L J 1084.

⁶⁸ George W Pring, ‘SLAPPs: Strategic Lawsuits Against Public Participation’ (1989-1990) 7 PACE Environmental LR 3, 5.

⁶⁹ Joshua R Furman, ‘Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation’ (2001-2002) 25 Seattle U LR 213.

⁷⁰ (n 10).

4.1 Public Interest in Protecting Anonymity of Bloggers

Following the decision in *NightJack*, one commentator put it, 'Is it truly in the public interest to know who every blogger is?'⁷¹ Or why is it in the public interest to know who every blogger is?

The information produced as a result of blogging under a pseudonym in *NightJack* sums up the key characterisation of how anonymity contributes to democratic discourse and encourages speech provided it is accurate and reliable.

Another point for consideration in making the argument for justifying anonymity is on the basis that anonymity should be protected where firstly, there is no alternative platform to comment critically on matters of public importance and secondly, the decision of the speaker in electing a particular platform to speak was on the basis that it offered anonymity to the speaker. Perhaps *NightJack* required a platform to do exactly this and for this purpose. This justification for protection anonymity is certainly not unconditional and should be subject to provisos where anonymity may be forfeited.

What would have been in the public's interest for anonymity to be preserved? On *NightJack's* blog, as a result of his ability to write through anonymity the public could access political and critical commentary on government with critique on ministers and public and social institutions such as the police. Could we claim that speech or expression on an anonymous blog is protected expression under Article 10, bearing in mind the proviso to Article 10, as it is under the First Amendment to the United States Constitution?

The use of anonymity is steeped in the US First Amendment tradition and several decisions of the US Supreme Court. The first amendment forbids Congress to make laws 'abridging the freedom of speech, or of the press'. The tradition of anonymity or use of a pseudonym has long been entrenched in the American jurisprudence and constitutional principles are invoked when this tradition is threatened. Drawing a historical link to the tradition of anonymity in the UK, anonymous pamphlets have been produced in England from the

⁷¹ Anders Sandberg, 'Sometimes justice wears a mask: blogging, anonymity and the open society' (Practical Ethics: Ethical Perspectives on the News, 18 June 2009) <
<http://blog.practicaethics.ox.ac.uk/2009/06/sometimes-justice-wears-a-mask-blogging-anonymity-and-the-open-society/>> accessed 28 July 2012.

beginning of print.⁷² Supreme Court decisions such as *Talley v. California*,⁷³ and *McIntyre v. Ohio Elections Commission*,⁷⁴ both involving anonymous pamphlets, reaffirmed that anonymous speech is protected under the First Amendment and both cases observed the contribution anonymous speech has had on society's progress. In *McIntyre*,⁷⁵ the court stated that: 'Anonymity is a shield from the tyranny of the majority.' The majority of the Supreme Court in *McIntyre* held that 'the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry'.⁷⁶ The court further added that 'an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment'.⁷⁷ The right to speak anonymously is not absolute as seen in decisions such as *McConnell v FEC* where the Supreme Court highlighted the dangers of anonymous speech.⁷⁸ The court upheld the constitutionality of the Bipartisan Campaign Reform Act 2002 which imposed disclosure requirements to limit certain types of anonymous political speech during election campaigns, in this case, television advertisement for or against a candidate for federal office. The aim, based on an anti-corruption rationale of the Act, was for citizens to disclose anonymous purchase of television advertisement to prevent danger of corruption of elected representatives.

Lidsky and Cotter's analysis of traditional First Amendment theory suggests that the right of anonymous speech finds itself premised in firstly the belief that 'the audiences are capable of rationally assessing the truth, quality and other characteristics of core speech' and secondly, 'that more speech is generally preferable to less'.⁷⁹ The Internet and its various information-relaying platforms, whether blogs or social networking sites, have generally encouraged more discourse. There is information, commentary, opinion, criticism and a lot more that is easily available and accessible on any and every conceivable topic. The ability of

⁷² (n 67) 1084.

⁷³ 362 US 60 (1960) 64.

⁷⁴ 514 US 334 (1995) 341 note 4.

⁷⁵ *ibid* 357.

⁷⁶ (n 74) 342.

⁷⁷ *ibid*.

⁷⁸ 540 US 93 (2003) 128.

⁷⁹ (n 65) 1581-1588.

audiences to rationally assess and discern good public discourse from the bad on such platforms takes place close to instantaneously, through a process of comments posted by readers and the ability to share and link the story to a critique. When a tweet storm is created, as was the case with 75000 tweeters naming the footballer implicated in an alleged affair where an injunction had been obtained to keep his identity private, it can hardly be ignored that the tweet-propelled publicity forced parliamentary debate.⁸⁰

It is essential to weigh up speech made by speakers who have high autonomous interest such as in political realms against the low risk of harm of such speech in order to take a position of non-disclosure.⁸¹ In several US cases, where there were applications for the issuance of a subpoena in disclosing identities or information related to the identities of anonymous bloggers, the courts' approach may be instructive. In *re Subpeona Duces Tecum to America Online Inc*,⁸² a case involving defamatory statements made about a company and the disclosure of confidential insider information, the Circuit Court of Appeal was of the view that allowing a subpoena for America Online (AOL) to reveal the identity of users of AOL chat rooms through the disclosure of information of four email users 'would constitute an unreasonable intrusion on their First Amendment rights'.⁸³ More importantly the court emphasised the need to balance the competing interests by considering '...whether a state's interest in protecting its citizens against potentially actionable communications on the Internet is sufficient to outweigh the right to anonymously speak on...[the Internet].' In such instances, the court laid down the test to be adopted when such subpoenas are challenged whereby a court should only order a non-party such as a service provider 'to provide information concerning the identity of a subscriber...when the court is satisfied by the pleadings or evidence supplied to that court...that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and...the subpoenaed identity information is centrally

⁸⁰ 'Ryan Giggs named by MP as injunction footballer' (BBC News, 23 May 2011) <<http://www.bbc.co.uk/news/uk-13503847>> accessed 14 June 2011; Column 638, *Hansard* (House of Commons, UK Parliament, 23 May 2011) <<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110523/debtext/110523-0001.htm#1105237000752>> accessed 20 September 2012.

⁸¹ (n 65) 1590-1591.

⁸² No. 40570, 2000 WL 1210372 (52 Va Cir 26).

⁸³ *ibid* 33.

needed to advance that claim’.⁸⁴ The court decided in favour of the company, issuing the subpoena accordingly but nevertheless being conscious of the risk of disclosing the identity of the users who may not have a fiduciary or contractual duty to the company. In weighing the competing interests, the court felt that there was a compelling state interest in protecting companies such as in this case and noted “the potentially severe consequences that could easily flow from actionable communications on the information superhighway” could “significantly outweigh the limited intrusion on the First Amendment rights of any innocent subscribers”.⁸⁵ When drawing in Article 10(1) and (2) of the Convention into the discussion, the exercise that the court will have to undertake will be in balancing the interest of the anonymous blogger who writes on socio-political issues against the risk of harm of such speech.

4.2 Protecting Anonymity of Bloggers under the Laws of Privacy

Article 8 of the European Convention of Human Rights could help in making a case whether there is a reasonable expectation of anonymity under the laws of privacy in order for the citizen journalist to continue writing on public interest matters guaranteed under Article 10 – that is if there is no other countervailing public interest. For the citizen journalist writing anonymously, the right to privacy under Article 8 is the condition precedent in enabling the right under Article 10 to have his/her speech published.

As stated earlier, Justice Eady commented that *NightJack* could not have a reasonable expectation to anonymity premised on the fact that ‘blogging is essentially a public rather than a private activity’.⁸⁶ In a sense Justice Eady is suggesting that a reasonable expectation of privacy encompasses a reasonable expectation to anonymity. However, is Justice Eady accurate in stating that the activities of citizen journalists on the Internet such as blogging are public *rather than* private activity? Surely, at the time pamphlets were the medium for citizen journalists, where there is evidence of use of pseudonyms in pamphlets such as *Common Sense* and *the Federalist Papers* motivated to mobilise political shift or reform as discussed in Chapter 3, the writer’s non-disclosure of his identity was essential. Similarly, at

⁸⁴ *ibid* 37.

⁸⁵ *ibid*; See also *Dendrite International Inc v. John Doe* 775 A 2d 756 (NJ Super Ct App Div 2001).

⁸⁶ (n 1) [11].

the Speaker's Corner on Trafalgar Square, a person might be identifiable but remain anonymous or at least unknown as s/he is not required to identify her/himself. Without the protection of the right to privacy, or legal reprisals when privacy of one's identity is divested, may contribute to the chilling-effect on social media activity particularly of the socio-political nature.

In simple terms, the argument that is at the heart of the debate about privacy is the use and especially the misuse of information about an individual.⁸⁷ Without having to delve deep into the definition and concept of privacy, which is beyond the scope of this thesis, an understanding of privacy in the context of anonymity is essential. In defining privacy, Nizer and Westin draws in anonymity – Nizer as a state of being “anti-social” and Westin as existing in a state of “public privacy”. Nizer states that ‘The right of privacy, in essence, is anti-social. It is the right of an individual to live a life of seclusion and anonymity, free from the prying curiosity which accompanies both fame and notoriety.’⁸⁸ Westin defines privacy as a claim - a ‘claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others’.⁸⁹ Westin's proposition of the four states of privacy includes a state of anonymity which is ‘the desire of individuals for times of “public privacy” where ‘the individual is in public places or performing public acts but still seeks, and finds freedom from identification and surveillance’.⁹⁰

Privacy is viewed by some as a necessity for an open society in the electronic age. Eric Hughes in *A Cypherpunk's Manifesto* adds that ‘Privacy is not secrecy. A *private matter* is something one doesn't want the whole world to know, but a secret matter is something one doesn't want anybody to know. *Privacy is the power to selectively reveal oneself to the world.*[Emphasis added]’⁹¹

⁸⁷ Raymond Wacks, *Personal Information: Privacy and the Law* (Clarendon Press 1989) 1, 2.

⁸⁸ Louis Nizer, ‘The Right of Privacy: A Half Century's Developments’ (1941) 39 Mich LR 526, 528.

⁸⁹ Alan Westin, *Privacy and Freedom* (Atheneum 1967), 7

⁹⁰ *ibid* 32.

⁹¹ Eric Hughes, ‘The Cypherpunk's Manifesto’ <<http://www.activism.net/cyberpunk/manifesto.html>> accessed 30 May 2011.

In *A v. B plc and C*,⁹² Lord Woolf CJ (as he then was) referred to Gleeson CJ's explanation in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*⁹³ on 'the difficulty of distinguishing between public and private information':

There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public...The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

Can a person's identity be identified as private and in the context when a person is communicating through a very public means such as the Internet? Lord Hope in *Campbell v MGN*⁹⁴ relying on the guidance of the Court of Appeal in *A v B plc and C*⁹⁵ set out the first question to be addressed – 'whether the information that was disclosed was private and not public'.⁹⁶ Where the answer is less obvious, then we are presented with the second question – 'whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.'⁹⁷ Lord Hope added that 'The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.'⁹⁸

In *Murray v Big Pictures Ltd*, the Court of Appeal citing Lord Hope above,⁹⁹ added that:

...the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the

⁹² [2003] QB 195, 206.

⁹³ [2001] HCA 63, [42].

⁹⁴ [2004] UKHL 22.

⁹⁵ (n92) 206, para 11 (vii).

⁹⁶ (n 92)[92].

⁹⁷ *ibid.*

⁹⁸ (n 92)[99].

⁹⁹ (n 94) 99.

attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.¹⁰⁰

Further, the European Court of Human Rights in its pronouncements in *Peck v United Kingdom*¹⁰¹ and *von Hannover v Germany*¹⁰² recognised pockets of privacy protected acts carried out in public.

Just taking the spirit of the comment by Gleeson CJ *supra*, from the last sentence without further extrapolation suggests that a reasonable person of ordinary sensibilities would have arrived at the conclusion that Detective Peter Horton a.k.a. *NightJack* cherished his privacy.

The importance to privacy of citizen journalists from having their identity revealed is to avoid publicity from the public eye bearing personal circumstances for wanting to remain private about their identity, for instance the impact on family, friends and employers. This is particularly in the context of speech in the socio-political realm, where individuals may not want to get embroiled with political muckraking. Keeping their identity private is essential in keeping apart their offline and online identities. As in *NightJack's* case demonstrates, the loss of privacy may result in the loss of speech.

4.3 Accountability

In determining whether there is some countervailing public interest to justify disclosure, it may be at this stage we have to begin engaging with the issue of accountability. At which point will the right of anonymous citizen journalist under articles 8 and 10 be trumped by the need for accountability?

Whilst anonymity may enable individuals to speak out free from political or social reprisals and has been 'assumed for most constructive purposes',¹⁰³ it is undeniable that anonymity on the Internet or in any activity encourages harmful, hate and false speech when

¹⁰⁰ (n 94)[99].

¹⁰¹ (2003) 36 EHRR 41; [2003] EMLR 287.

¹⁰² (2005) 40 EHRR 1; [2004] EMLR 379.

¹⁰³ (n 73) 65.

individuals can behave in an uncivil fashion as they think they are immune from reprisals. As far back as 1994, Professor Trotter Hardy commented that ‘Anonymity is power and I think it will be abused on the Net.’¹⁰⁴ The potential to cause harm through anonymous messages on the Internet is far greater in comparison to any other medium. As it is not a medium that brings the speaker face-to-face with his/her subject, the ability to dehumanise the victims of harmful speech and remove the civility that comes with face-to-face encounters is greater.¹⁰⁵

Accountability in its basic form is the acceptance of responsibility for one's actions.¹⁰⁶ Accountability is essential in order to ensure that there is a basis for an innocent injured party to redress a grievance and in essence to uphold the importance of freedom of speech and expression in so far it is not to be used as a tool of abuse and harm. McQuail ties in media accountability to society particularly the degree of accountability owed in balancing it in relation to public interest and freedom of speech.¹⁰⁷ McQuail was focused on “the core activity of the media” in identifying different players who were in the activity of publication and the duty of accountability as being attached to this core activity. McQuail links his exposition of the “media” to accountability:

The term ‘media’ can variously identify an industrial sector, a set of technologies, a set of firms and organizations with power in society, or an institution often referred to as ‘the press’. None of these meanings captures what is central to the theme of this book, although all are relevant. In order to get to the heart of the matter, our attention focuses on the *core activity of the media* [added emphasis] since the earliest days of printing, which is to publish, to mediate between authors and original sources and an eventual audience or public, facilitating or realizing the act of publication. The term

¹⁰⁴ Peter H Lewis, ‘Computer Jokes and Threat Ignite Debate on Anonymity’ (*New York Times*, 31 December 1994) <<http://www.nytimes.com/1994/12/31/us/computer-jokes-and-threats-ignite-debate-on-anonymity.html?src=pm>> accessed 30 May 2011. Trotter Hardy, *The Proper Legal Regime for “Cyberspace”*, (1994) 55 U Pitt LR 993, 1050-51.

¹⁰⁵ Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces* (1994-1995) 104 Yale LJ 1639, 1645.

¹⁰⁶ *ibid.*

¹⁰⁷ Denis McQuail, *Media Accountability and Freedom of Publication* (OUP 2003) 4,5.

‘the media’ collectively identifies all organizations, roles, means, and activities that contribute to publication. The latter means to bring expression into the open and to disseminate it further. Media accountability relates both to the purposes and also the consequences of publication. It refers to all ways in which public communication is ‘accounted for’, by its originators, its recipients, and those affected by it.¹⁰⁸

If citizen journalists on the Internet are to be viewed seriously as performing a function that is analogous to that of journalists, the yardstick for citizen journalists to measure against could be that of accountability standards of professional journalists. These standards are imposed both by law and the profession and are often used as measures for gatekeeping by editors before information and news is published for public consumption. Owing to the lack of gatekeeping measures and absence of editors, the citizen journalist who does not work within a chain of command, is both the writer and editor all rolled up in one – who makes the final decision to publish. It is this lack of gatekeeping that makes a strong argument for amplifying the importance of accountability. Failure in holding up to these standards leaves the citizen journalist open to a legal action if the consequences of the lapses in accountability result in some form of harm or injury unlike the professional journalist who will be bound by codes of conduct and subjected to an investigation by the professional body such as the PCC as well as the probability of a legal suit and has the protection of his employer.

In the context of accountability in media or journalism, the balance between the rights of the media and that of other parties such as private citizens, corporations and state entities is spoken of where there is the need to balance freedom of speech against other interests. Media entities are faced with some key areas where accountability imposed by law must prevail in areas such as contempt of court when reporting legal proceedings, defamation, data protection in processing personal data including sensitive personal data and privacy. The emphasis in upholding these values can be seen in journalistic codes as discussed in Heading 7 in Chapter 5.

¹⁰⁸ *ibid.*

4.4 Balancing Article 8 and Article 10 rights of Citizen Journalists in the Claim for Anonymity and Privacy against Accountability

Branscomb speaks of how 'one might distinguish between potentially hazardous message sources and other more innocuous uses of anonymity, thereby enabling the law to insulate from liability the majority of information providers while imposing liability on those originating the abusive messages.'¹⁰⁹ This distinction of harmful anonymous speech must be made from beneficial anonymous speech. How will the courts achieve this? The courts will have to undertake the balancing exercise as discussed in Headings 4.3 and 5.4 in Chapter 5.

When drawing in Article 10(1) and (2) of the Convention into the discussion, the exercise that the court will have to undertake will be in balancing the interest of the anonymous blogger who writes on socio-political issues against the risk of harm of such speech in line with the three stage test set out by the European Court in the *Sunday Times* case.

In the US, the right to speak is not absolute and where it comes into conflict with genuine and compelling interests of third parties, disclosure may be warranted. Where claimants are seeking redress arising from harmful speech, claimants seek a discovery subpoena from the court, popularly known as *John Doe* proceedings, to order ISPs, website host or social networking sites to disclose the identity of anonymous users. On numerous occasions, micro-blogging site, *Twitter*, has become embroiled in this issue – none more famous when *Twitter* become embroiled in the centre of controversy of rogue tweeters who named the identity of a footballer whose identity was protected by injunction¹¹⁰ and the application made by a UK council in a Californian court to order the disclosure of an identity of a blogger who had made libellous statements on his blog.¹¹¹ The global reach of social media platforms adds an extra dimension in the outreach of such disclosure applications. Such a subpoena creates the risk of the loss of one's privacy as an anonymous speaker if the

¹⁰⁹ (n 105)1661.

¹¹⁰ Jon Kelly, 'Super-injunctions: What could happen to rogue tweeters?' (*BBC News*, 23 May 2011) <<http://www.bbc.co.uk/news/magazine-13500030>> accessed 30 May 2011.

¹¹¹ 'South Tyneside Council 'gets Twitter data' in blog case' (*BBC News*, 30 May 2011) <<http://www.bbc.co.uk/news/uk-england-tyne-13588284>> accessed 30 May 2011. The application was made in California as Twitter is based in San Francisco, California.

claimant fails in the claim leading to the potential abuse of the process arising from SLAPP suits. It bears on the courts to be prudent in issuing such disclosure subpoenas. Although there have been numerous standards used by the courts, the key to the unmasking and disclosure of anonymous speakers is to undertake a balancing exercise after the claimant successfully proves that attempts have been made to provide notice to the anonymous speaker and has evidenced a meritorious claims against the said speaker.¹¹² This is where the court weighs the defendant's First Amendment right to speak anonymously against the claimant's case for disclosure.¹¹³ This was discussed in Heading 4.1 *supra* with reference to the case of *re Subpeona DucesTecum to America Online Inc.*¹¹⁴

In the UK, the disclosure procedure involves a *Norwich Pharmacal* application, named after the decision of the House of Lords¹¹⁵ where the conditions for such application was laid out. In essence it is where the person against whom the order is sought has facilitated the wrongdoing, he therefore comes under a duty to assist the person who has been wronged by providing full information and disclosing the identity of the wrongdoers.¹¹⁶ The said procedure has been successfully used in removing anonymity of Internet users where the applications have been made against website hosts where users have made defamatory remarks on the website forums.¹¹⁷ These applications have been successfully made on sites hosted outside the UK.¹¹⁸

The use of the *Norwich Pharmacal* application has been used previously in lifting confidentiality of journalists' sources. However, in view of the European Court of Human Rights decision in *Financial Times v United Kingdom*,¹¹⁹ this may be seeing the end of its

¹¹² Matthew Mazzotta, 'Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers' (2010) 51(3) Boston College LR 833, 855.

¹¹³ *Independent Newspapers Inc v Brodie* 966 A 2d 432 (Md 2009) 457; *Mobilisa Inc v. Doe 1* 170 P 3d (Ariz Ct App 2007) 720-21; *Dendrite International Inc v. Doe No.3* 775 A 2d (NJ Super Ct App Div 2001) 760-61. See discussion at p 247, (n 82) of this chapter.

¹¹⁴ (n 82-85).

¹¹⁵ *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943.

¹¹⁶ *ibid* 948.

¹¹⁷ *Totalise plc v The Motley Fool Ltd and another* [2001] EMLR 750; *Sheffield Wednesday Football Club Ltd and others v Hargreaves* [2007] EWHC 2375 (QB), [2007] All ER (D) 270 (Oct).

¹¹⁸ *Applause Store Productions & Firsh v Raphael* [2008] EWHC 1781, [2008] All ER (D) 321 (Jul); *G & G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), [2009] All ER (D) 92 (Dec); *Lockton Companies International & Others v Persons Unknown and Google Inc* [2009] EWHC 3423 (QB).

¹¹⁹ (App No 821/03) 15 December 2009.

days. The European Court held a *Norwich Pharmacal* order in compelling journalists to reveal confidential sources to be in breach of Article 10 resulting in a chilling effect that would encroach upon the protection of journalistic sources as a vital element in journalistic freedom in a democratic society. In *Totalise*, at the Court of Appeal,¹²⁰ the court made it evidently clear that in making such an order, the court has to take cognizance of the Data Protection Act 1998 in that no order can be made unless paragraph 6 of Schedule 2 of the Act has been considered. This is where the order of disclosure has been made upon consideration of ‘the rights and freedoms or legitimate interests of the data subject.’ The court goes on to caution that this consideration must be made in light of Article 10. The unmasking of anonymous speakers may be limited in view of the above two cases where the exercise of issuing of such orders must not stifle Article 10 rights.

5. Protecting the Identity of the Blogger as a Confidential Source

Drawing together the two strands of the discussions above, if a blogger has the potential to be functioning as a journalist and wishes to do so under the cloak of anonymity, can an argument be made that there should be a case of protecting the anonymity of the blogger as a confidential source? This is where the social media actor is the journalist as well as the source of the information.

In the US, several states have enacted ‘shield laws’ to accord protection to confidential sources and in the context of the UK, based on the decision of the European Court of Human Rights in *Goodwin v. UK*,¹²¹ the protection of journalistic sources is seen as ‘one of the basic conditions for press freedom’.¹²² The European Court held that in the absence of such protection, sources may be discouraged from assisting the press. This will in turn undermine the role of the press as a ‘public watchdog’ and any disclosure of sources would be in violation of the guarantee of free expression under Article 10 unless in the absence of an overriding requirement of public interest. The rationale behind the protection of identity of sources is very much connected to the role played by the press as the Fourth Estate. In the UK, non-disclosure of confidential sources is provided for under section 10 of the Contempt

¹²⁰ *Totalise plc v The Motley Fool Ltd and another* [2001] EWCA Civ 1897 [24]-[25].

¹²¹ (2002) 35 EHRR 447.

¹²² *ibid* [39] (majority decision).

of Court Act subject to a proviso which stipulates that a disclosure may be necessary ‘in the interests of justice or national security or for the prevention of disorder or crime.’ In applying this section, the English courts have essentially undertaken a ‘balancing exercise’. Lord Bridge set out in the House of Lords decision of *X Ltd and another v Morgan-Grampian (Publishers) Ltd and others*¹²³ (the decision which was the basis of the appeal to the European Court of Human Rights in *Goodwin’s* case) a non-comprehensive indicator of factors that the court will consider in this balancing exercise. These include whether the person seeking disclosure shows that his livelihood depends on it, that he is protecting more than just a minor interest in property, that the greater the legitimate public interest in the information, the greater the importance of protecting the source whether the information was obtained whether legitimately or illegally.

In a typical scenario, journalists rely on information provided by sources who are not willing to reveal their identity for fear of repercussions and journalists act as ‘conduits’ to reveal to the public at large matters of public interest. With the help of various information-relaying platforms for users on the Internet, the ‘source’ may not need a special ‘conduit’ but could themselves rely on platforms such as blogs to place matters of public interest in the public forum. The ‘source’ and the ‘journalist’ are then one and the same – the blogger.¹²⁴ Hence, the blogger could enjoy the protection as a confidential source under the law if the balancing exercise tips in the favour of the blogger. *NightJack* would not have been able to blog if the public at large or the people who he worked with or dealt with on a daily basis were aware of his identity. His blogging activities would necessarily be restricted if the public at large or the people who he worked with or dealt with on a daily basis were aware of both his activity and pseudonym.

6. Concluding Remarks

6.1 Citizen Journalists as Journalists

In considering whether bloggers are journalists, apart from the considering the value of the information being of journalistic value, particularly in the “public interest” category, there

¹²³ [1990] 2 All ER 1, 8-9

¹²⁴ See K.S. Lee, ‘Hiding from the Boss Online: The Anti-Employer Blogger’s Legal Quest for Anonymity’, (2006) 23 Santa Clara Computer & High Tech Law Journal 135,155.

must also be an additional consideration whether the blogger has performed the function of a journalist. One of the essential elements in professional journalism is the need for testing the integrity of the information by utilising the ‘journalistic process’ test. There is no dispute that the value of information on the blog in *NightJack*’s case had public interest value clearly satisfying the requirements that this was the type of speech that the First Amendment of the US Constitution and Article 10 of the European Convention of Human Rights was seeking to promote and protect. Not only did the information have journalistic value with the writing encompassing a commentary on social and political issues in relation to police work and administration of justice which the detective had first-hand exposure and knowledge of but also that *NightJack* carried out his blogging no differently than how a journalist would have done in ensuring that an appropriate journalistic process was adopted.¹²⁵

If citizen journalists are to be seen as having the potential of falling within the definition of a journalist, they would have to present themselves as the facilitator of freedom of expression akin to the role played by the media. In order to enjoy the public interest defence, citizen journalists will have to satisfy the ‘responsible journalism’ test and the information relayed must possess an element of ‘public interest’ value.

For this potential to be achieved, citizen journalists must disseminate information to the public which has a public interest value and not merely distribute *any* information. The essential consideration is the value and nature of the speech. The information must demonstrate some hallmarks of editorial oversight in order to satisfy several elements of the indicia test and the test of responsible journalism. Whether citizen journalists intend for the published information to have the abovementioned traits may not be relevant. This is in keeping with the fact that citizen journalists on the Internet may not be *intentionally* using social media platforms to publish in order to inform, debate, comment and share opinions as journalists but are doing so in the capacity of exercising their right to free speech and expression as citizens. The question whether they are performing a function analogous to that of a journalist is dependent on the circumstances of the rationale for which s/he is claiming to function as a journalist. The rights of journalists which the citizen journalist is

¹²⁵ (n1) [13].

invoking is used in the same way a journalist would invoke those rights – in circumstances when the publication is called into question for instance in cases of defamation in raising the defence of qualified privilege or fair comment; or when the exercise of the journalistic function is being curtailed for instance in cases of prior restraint or curtailment of the reporting of court proceedings.

6.2 Anonymity of Citizen Journalists on the Internet

Much criticism has been levelled against the UK courts' first brush in deciding on the issue of anonymity of citizen journalists. The decision of the High Court in *NightJack's* case has been criticised for not appreciating the importance of anonymity in particular the privacy rights of Internet users and anonymity as an inducing factor for speech on the Internet.¹²⁶ Disclosure of identity under *John Doe* applications in the US and *Norwich Pharmacal* applications in the UK require a *prima facie* claim against the user.

In *NightJack's* case his identity was already known to his employer and it required no further disclosure to the public at large. It would have been sufficient for the public to know that he was a police officer without disclosing his name. Even if Richard Horton was already known to be the *NightJack* and faced disciplinary proceedings against him by his employers, isn't there an argument to be made that he may still have wanted to remain anonymous to the rest of the world? If as a result of weighing the competing interests, taken in a different scenario where his employers were unaware of his identity, the court may have decided that his employers have a right to know in order for them to commence disciplinary proceedings against him for breaching a code of conduct or ethics and the court would have ordered that his identity be revealed to them, the consequence of this would be that his right to continue to speak anonymously is relinquished but his right to be anonymous to the general public is not.

In achieving the balance between competing interests, there is a need for the examination of certain factors before anonymity can be lifted. The first is the appreciation of the value of speech which is being made by the anonymous speaker in that it must be essential to democratic discourse and the silencing of such speech as a result of removal of anonymity

¹²⁶ Kirsty Hughes, 'No Reasonable Expectation of Anonymity?' (2010) 2(2) *Journal of Media Law* 169; Eric Barendt, 'Bad News for Bloggers' (2009) 1(2) *Journal of Media Law* 141

will impact of Article 10 right and the corresponding First Amendment provision. Secondly, is the need to ensure that other means have been utilised such as bringing the claim to the notice of the anonymous speaker in order for the matter to be dealt with in private or removal of the offending entry or post including perhaps an apology. Thirdly, is to ensure that the disclosure is necessary in that the claim against the anonymous speaker is meritorious and will achieve the desired aim of the claimant. And finally, whether the importance of endorsing anonymity, as it is important to both the speaker and the speech, outweighs the need to lift the cloak of anonymity in order to serve the claimant's action. It is essential to weigh up speech made by speakers who have high autonomous interest such as in political realms against the low risk of harm of such speech in order to take a position of non-disclosure.¹²⁷ The whole question of when is the justification for a limited right of anonymity appears to pivot on the value of the speech being made.

To borrow Branscomb's succinct view on the matter – 'Anonymity should not be outlawed as a general principle; there are varying levels of anonymity, or at least pseudonymity, that are rational and justifiable...Whether or not anonymity is to be permitted or even encouraged depends upon the particular circumstances under which it is deployed, but it must be understood that many netizens are unlikely to waive their perceived right to personal autonomy, which some define as a right to genuine anonymity.'¹²⁸ The citizen journalist on the Internet who wishes for social media activity to continually contribute to genuine political, social and democratic debate in a meaningful way is confronted with the risk of loss of anonymity. The point to be made is whilst the question of the extent of the right of anonymity will continue to fuel debate, one of the ways in which the place for quality and credible discourse by social media actors can be achieved, and for such activity to prevail and increase in importance as a source of information and news, is in complying and measuring against a standard where a strong degree of accountability resonates. Both the courts in the UK and in the US are increasingly taking this stand in view of the recent decision of the Californian court to subpoena *Twitter* for a release of information of an anonymous blogger in the UK who had allegedly made libellous statements. As it is the case

¹²⁷ (n 65) 1590-1591.

¹²⁸ (n 105) 1675.

with the Internet and its users, the astute ability to adapt to trends is second nature. We may well see that these decisions will serve to see speech on the blogosphere and the Internet's wide variety of forums rise to these expectations.

6.3 Citizen Journalists as the Confidential Source

Revisiting *NightJack's* case, Detective Horton a.k.a *NightJack* was the 'source' and the 'journalist'. Applying Lord Bridge's indicative factors to *NightJack*, the disclosure of his identity clearly affected his livelihood. In being anonymous he was protecting both his employment and his own sources. He blogged on matters of public interest. He was the direct recipient of the information he placed on his blog and ensured, as mentioned earlier, that he disguised the information, did not comment on pending and active cases so as not to fall foul of the Contempt of Court Act 1981 nor flouted any court reporting restrictions.

6.4 Conclusion

NightJack's decision may have provided the impetus for bloggers to strengthen their argument. It can be viewed as a step forward in the recognition that blogging is an activity that is important enough to merit a court's consideration of its function and purpose. Whilst the first consideration of whether citizen journalists can be considered to be carrying out a journalistic function and therefore may have the right to a public interest defence extending to socio-political discourse was premised on principles that applied to journalists, the second consideration of anonymity was made on the basis of special treatment of the position of socio-political bloggers. The latter requires the appreciation of social utility of the speech made anonymously in widening the forum for democratic discourse to individuals who may not have the might and strength of an establishment to back them but simply the will or desire to relay their message. In the same way in which Paine viewed print, citizen journalists view the Internet as a tool that acts as a medium of communication that is publicly accessible and accountable and not a tool for the 'monopolistic control of government, journalists or printers'.¹²⁹

¹²⁹ Aled Jones referred to Thomas Paine's view of the medium of communication where Jones states: 'Print for him [Paine] was essentially a publicly accessible and accountable medium of communication, not a tool under the monopolistic control of government, journalists or printers.' Aled Jones, *Power of the press: newspapers, power and the public in nineteenth-century England* (Scolar Press 1996)12.

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1. Introduction

The study has explored the interaction of the media and the individual, and the phenomenon of citizen journalism on the Internet with the aim of setting out the development of rights and responsibilities arising from the legal recognition of published information by citizen journalists through the use of various platforms on the Internet. This research has been undertaken to answer the central research question of whether there is a legal recognition of citizen journalism on the Internet and the nature of the rights and responsibilities of citizen journalists.

The phenomenon needed exploring as with the evolution of the Internet and its platforms, the individual who was initially the recipient, has now become the producer of news which led to the interaction between the individual with the media. The individual who was the passive

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recipient of information, both from the Internet and mainstream media, evolved into the generator of information and news – the citizen journalist. The Internet allowed the individual citizen journalist to engage with other individuals through commentary, opinion and debate – a role traditionally carried out by institutionalised mainstream media. It was therefore essential to understand how the law would recognise citizen journalism when traditionally and historically it has recognised mainstream media in its multifarious role and prescribed it with rights and responsibilities. This recognition requires a new reflection as the role of the media is being carried out by actors who are not part of the traditional and recognisable institution that is the media.

The legal exploration sought to determine how the law would view the citizen journalist on the Internet who is contributing to socio-political discussion that has a public interest element and whether the law could view the citizen journalist in this context as performing a role that is analogous to that of a journalist working for a news organisation whilst appreciating the unique characteristics of citizen journalism on the Internet which are distinctive from professional journalism. The thesis is an investigation of the legal challenges that citizen journalism on the Internet raises particularly in obtaining recognition as a tool of freedom of speech akin to the role played by the media or the press. This legal exploration is vital in supporting the sentiment underlying the research that the according of credibility to citizen journalism on the Internet as a positive element in society rests upon its legal recognition.

The theoretical literature on the media provided strong guidance in embarking on the legal exploration as the theme emerging from the theories indicated that freedom of speech is a necessary condition for a democratic and just society. The theories were helpful specifically in the context of providing the foundational support that the media's role as a conduit of public engagement and discourse was vital as an effective tool for freedom of speech. Hence, the theories explored were capable of extending the same credence to citizen journalism as a similar conduit.

The thesis contextualises the legal consideration premised upon the backdrop of the historical contribution of citizen journalism and the rise of the phenomenon. The historical view was

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particularly helpful in setting out how both the medium and message of the mass media, whether mainstream or otherwise, has evolved over the centuries and in recent years. It also evidenced how the media theories impacted on this evolution. The historical view also evidenced moments in media history where the evolution of the medium facilitated the emergence of alternative platforms for speech not unlike the use of the Internet and social media platforms by citizen journalists. And the evolution of the medium of print and the emergence of pamphlets and newspapers were considered to be important landmarks in bringing civic engagement democratic discourse, debate and commentary to the mass media and it is these activities carried out the mass media that has underlined decisions of the courts in developing freedom of speech in the context of media rights.

The main aim of the thesis is to explore the new legal conundrums arising from citizen journalism on the Internet and the legal responses thereto in order to develop several legal norms related to citizen journalists through the development of rights and responsibilities. This was undertaken on the following basis:

Firstly, through the exploration of the extension of the traditional rights and responsibilities related to the media to citizen journalists on the Internet when contributing to socio-political discussion which is in the public interest undertaken from the perspective of development of the US First Amendment right to free speech and the scope of the First Amendment expounded on by the US Supreme Court, the development of right to free speech in the UK where the European Court of Human Rights in Strasbourg has prescribed a clear standard in deciding the scope and protection under Article 10 of the European Convention of Human Rights; and Malaysia, where in spite of freedom of speech being protected under Article 10 of the Federal Constitution, media rights remain an unfilled legal basin.

Secondly, in setting out the development of new legal norms in relation to citizen journalists on the Internet which are different from those related to traditional mainstream media and professional journalists and unique to citizen journalism on the Internet.

The above exploration was undertaken in five chapters (not including Chapter 1 which is the introductory chapter). Chapter Two explored the prevalent media theories that were helpful in

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answering some of the legal conundrums particularly in understanding the reasoning in justifying taking a particular stand in setting out the rights and responsibilities of citizen journalism on the Internet. Chapters 3 and 4 acted as a precursor entailing the examination of the importance and evolution of media and citizen journalism, and the exploration of the challenges posed by this media. Chapter 3 provided the historical view which is particularly helpful in setting out how both the medium and message of the mass media, whether mainstream or otherwise, has evolved over the centuries and recent years. This exercise was essential in identifying the strands that emerged in the evolution of media identifying themes and trends that re-appeared over time. Where Chapter 3 ends with the evolution of the medium being at the stage of the Internet, Chapter 4 built on how the new media became the tool for citizen journalism on the Internet providing an insight into the phenomenon and as a precursor to understanding the subject matter of the thesis. Chapter 5 and 6 explored the legal dynamics surrounding the phenomenon, discussing the legal responses the courts or legislature would be guided by in setting out the rights and responsibilities of citizen journalists on the Internet. Chapter 5 set out the scope of the rights and responsibilities of the media in the context of the US, UK and Malaysia. This exercise was essential as the first element of the research is to explore the extension of the traditional rights and responsibilities related to the media to citizen journalists on the Internet when contributing to socio-political discussion which is in the public interest. Chapter 6 raised the need for specific development of legal norms unique to citizen journalism on the Internet.

2. Findings

2.1 Theoretical Findings

The selected theories supported the views that freedom of speech is a necessary condition for a democratic and just society. With press freedom and rights rooted in these theories, citizen journalism on the Internet that serves to function in the same manner as the mainstream media must have the benefit of having its rights premised on the same rationale.

The mass society theory promotes the view that the media has the potential to remove autonomous thought and opinion forming on the part of individuals. The original concern raised

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by mass society theorists, of the rise of the “masses” perceived as a threat to social order, re-emerges as being relevant and applicable to the present concern of governments and mainstream media entities of the rise of the voices of the citizen journalists on the Internet through social media platforms as the rise of the “masses”. Citizen journalism on the Internet which contributes to socio-political matters and issues of public interest that warrant recognition being accorded to the opinion and commentary relayed on the various platforms appear to remove the power from the power elites and revert to the concept of a “public” that expresses opinions and receives them. Further, the platforms facilitated by Web 2.0 represent tools of public communication that provide a chance to communicate immediately and effectively in responding to any opinion expressed. Citizen journalism on the Internet through social media has the ability in helping society to arrive at a “collective conscience” as strands of popular views emerge from the multiple-conversations.

From a Marxist perspective, social media allows individuals to directly contribute to national and international conversation and news, previously a position that was dominated by the traditional mainstream media. The permeation of social media in eroding this dominant position may vary from state to state depending on a variety of factors chiefly permeation of technology, pluralism of traditional media and as increasingly seen in democratic struggles, a need for an alternative channel of free speech and expression. Where the mass media is perceived to be functioning in a way that did not challenge existing institutions of powers, citizen journalism on the Internet however seems to function differently and at times in a diametrically opposing fashion where socio-political conversation is generated as an alternative source of news and information allowing individuals to directly challenge the dominant viewpoint of the mainstream media or the government.

If the press’s freedom is rooted in the freedom to publish in the free market as it serves democracy, then the same basis must underlie the potential for citizen journalism to do the same. The need to have channels of and for free speech is pivotal in the promotion of the freedom of speech. The liberal theory of the press is one of the strongest cornerstones for press freedom and has been extrapolated by the US Supreme Court in articulating its marketplace of

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ideas theory. The importance of open discussion to the discovery of truth is fundamental to free speech whereby State restrictions of freedom of expression which serve to remove the choice of individuals to make their own judgements of what they read inhibits this discovery. The opinion of each person is valuable and other individuals and society could either value that opinion to be true or if it is untrue, to challenge it. This then provides an opportunity for a truth to emerge. Social media activity certainly demonstrates a core value of the Millian principle as it contributes to valuable intellectual discussion and allows individuals to contribute to the debate on public affairs. Social media speech made by citizen journalists is the exercise of the right to speech as a right of the individual providing an effective avenue to magnifying the voice of public opinion and promoting the ability to debate, share and more importantly interact with the possibility of attaining the truth through a process of validation or challenge. Suppression of speech that does not promote the important values of free speech is equally important as the emergence of truth in speech. Quality of free speech has to be discerned when protecting speech generated by citizen journalists and that measurements to filter through the said speech must be undertaken by the legal institutions to determine the difference between speech that contributes to socio-political debate and speech that goes against the grain of sanctifying the discovery of truth.

If truth is the most important element to emerge from free speech, then the potential for this to happen is even more probable with interactive social media platforms. The platforms utilized by citizen journalism on the Internet are representative of “the marketplace of ideas”. In terms of social media activity, the ability of individuals to make views available through the various platforms and to have access to varied views ties in with the self-realization value that the theory positions itself on. This is where individuals need an uninhibited flow of information and opinion to aid them in making life-affecting decisions, in governing their lives.

The Internet and its social media platforms emerge as the “public sphere” in the manner characterised by Habermas. The concerns of an enlarged democracy of the “public sphere” require the development of ethics and norms across local, national and international values and cultures. It is a challenge to identify and accord validity to a foundation upon which the

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standards can be accepted by all who are affected given the divergent nature of the digital community involved. As Habermas propositioned, the only norms which can claim to be valid are those that meet or could meet with the approval of those who are affected as participants in a practical discourse. The suggestion of multiple public spheres is accurate resulting from a divergent nature of media and its continued evolution and even more evidenced in the surge of social media platforms. Web 2.0 being the new “political public sphere” minimises the influence of media as well as blurring the division between capability and opportunity for the public to engage in media-type activities. However, in the context of Malaysia, the public sphere on the Internet is a unique one where not all of the features of the public sphere exist. Whilst access to the public sphere is guaranteed to all citizens, in that non-censorship of the Internet is guaranteed under the law, there is however a limited and qualified freedom to express and publish opinions.

Any type of speech emanating from the Internet originating from citizen journalists must recognize the important role which they help function and more importantly, the need for such a role to be executed with accountability and responsibility as a tool for free speech can equally transform into a tool for hate, anger and abuse. The promoters of the “marketplace of ideas” theory developed a qualification of such a marketplace in the form of the “clear and present danger” test which draws the boundaries of the exercise of the freedom of speech. This type of qualification is typical of the wordings in Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention of Human Rights which require a balancing exercise to be undertaken in ensuring that in promoting the rights to speech and expression, countervailing interests are considered. The need for the right to free speech and expression to be a qualified one presents the dialectic in not only journalism but in all forms of speech and expression. In dealing with the dialectic, there is a need for codes applicable to the press that emerged in the 20th century and the recognition of the courts in *Reynolds* and *Jameel* on the breadth and width of journalism provides assistance in developing in the same manner the right approach to citizen journalism. The law in finding the middle path in the dialectic that faces the media and journalism is evident in these decisions where the courts set out the balancing that needs to be achieved between competing interests of the right to freedom of

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speech and expression and responsible journalism. Similarly, not all speech by citizen journalists is equivalent to speech by media entities. The decisions are helpful in determining the limits within which these speech rights will serve to protect speech made by citizen journalists

2.2 Historical Findings

The thesis contextualises the legal consideration premised upon the backdrop of the historical contribution of citizen journalism and the rise of the phenomenon. The narrative on the historical development of mass media and its medium demonstrated the media emerging as a transmitter of news into its role in setting public and political agendas. The evolution of the mass media is symptomatic of technological advancement - evidencing the fact that the media's evolution is dictated by the role played by the media in society. This role in turn is directed by a variety of factors, namely, the readership of the printed press. The historical context highlighted the theme that pervades the evolution of the media that individuals have always resorted to different forms of media, be it print or the Internet, to channel alternative non-mainstream viewpoints and this need arises when there is failure on the part of the mainstream media in executing its role as demanded by its readers or audience. This theme is re-visited with the emergence and popularity of citizen journalists on the Internet.

Alongside the development of mainstream media, the historical findings highlight the development of alternative media as new forms of speech. Pamphlets were the medium used in the earlier forms of individuals participating in generating media which were considered non-mainstream or non-conventional but having journalistic attributes and a considerable impact on the socio-political discourse in the way the political pamphlet came to be part of political life and discourse. It historically pinpoints the beginnings of democratised speech and the earliest forms of citizen journalism.

If pamphlets were the first statement of the liberal view in a free market of ideas and a publicly accessible and accountable medium of communication, citizen journalists with the use of Internet as a tool are equally leaving a mark on the evolutionary history and partnership between citizens and journalism. It demonstrates the ability of individuals to harness a technological development and turn it into a democratic tool through a developmental process

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of transformation and acceptance from that of a literary genre to one of authoritative socio-political writing not unlike how Internet-enabled tools which were seen as tools of communication and now to citizen journalism.

Historical findings also supported that fact that for the media to be an effective democratic tool to encourage debate, discourse and good governance, reliance on anonymity and pseudonymity has assisted in ensuring free and open discussion, avoiding negative consequences of wrongful retaliation. Anonymity in political writings is not a novelty and continues to be a catalyst for the publications of free and open commentary, opinion or debate on the Internet.

With the evolution of the medium, the evolution of the message followed. With the advent of newspapers, the role of the press in its role as the disseminator of information evolved into its role as the Fourth Estate. Where the press has attained recognition over a period of historical stages as amplifying the voice of the people, as conduit in democratic debate and as public “watchdog”, the legal recognition of rights and responsibilities followed. If this historical evolution is to be taken a step further to the present context, as the press obtained its recognition upon the recognition of its important as part of political and social commentary, the same can be said with citizen journalism on the Internet. The role of the media was to facilitate informed critical scrutiny and debate in line with its position as the Fourth Estate, the Internet in a similar role is seen as the Fifth Estate. If its role has the potential to contribute to society in all the roles and functions as the press carries out, the credibility of citizen journalism on the Internet similarly rests on the legal recognition that can be accorded to it.

The appreciation of the phenomenon of citizen journalism on the Internet contextualises the importance of its role and value to socio-political debate and discussion. The need for a sophisticated and effective strategy to adopt in targeting the root problem concerned with irresponsible content on new forms of media and platforms needs to be made in consideration of this role and value. The phenomenon evidences how social media and technology had played and continued to play a significant role in achieving political change. The Malaysian case study has shown that the Internet has contributed to the democratic process and public sphere. As

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noted in Chapter 4, citizen journalism on the Internet when contributing to socio-political discussion which is in the public interest results in the following – diversity of the sources of news; contribution to the marketplace of ideas; allowing individuals to provide insights not previously capable of being shared as effectively as in the present times owing to the technology; contribution to the national and international conversation; mobilisation of the organisation of thought and action amongst citizens of the state or persons having similar interests; and in general, enhance the right of individuals to speak, converse, debate and perhaps, act. Therefore, the need of the legislatures and governments to possess a deeper investigation and understanding of the phenomenon in order to respond effectively is essential.

2.3 Legal Findings

The legal findings provide a starting point in building some form of legal recognition for citizen journalists on the Internet in terms of their rights and responsibilities. The legal recognition of citizen journalists on the Internet in terms of rights that could be accorded to them essentially stem from media rights. In the case of the US and the UK, where the media has established rights through the development of constitutional principles of free speech and expression, the exercise of according citizen journalists with some form of recognition is built on these established rights. In the case of Malaysia, the challenge in protecting the rights of citizen journalists has no foundation of existing rights accorded to the media upon which to build on. The right of the media is limited to the right to publish and distribute. It is a case of filling the unfilled legal basin. A bottom-up approach needs to be taken in view of the insufficient development of jurisprudence related to media rights built on and derived from constitutional provisions namely freedom of speech and expression. Filling the unfilled legal basin must be constructed from building those rights for both established and recognised media entities as well as citizen journalists. There needs to be a stronger development of the freedom of speech jurisprudence as seen in the US and the UK in the context of the realities of an increasing well informed citizenry.

The legal findings are set out in the following headings:

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2.3.1 Protection under free speech principles

In order to extend the protection under free speech principle, several elements need to be satisfied. Firstly, there has to exist a constitutional basis for the protection of free speech. Secondly, the protection of free speech is accorded by considering the existences of any other countervailing right or interest and if there is, a balancing exercise will be undertaken to determine which right will prevail. Thirdly, in consideration of the balancing exercise, the exercise of free speech must be in the public interest with the publication satisfying the test of responsible journalism.

The exercise of the freedom of speech and expression is not an exclusive exercise of the press and mainstream media - borrowing Supreme Court Justice Brandeis phrase – ‘public discussion is a political duty’ and hence, provides a foundational point upon which to build the rights of citizen journalists. Protection of these freedoms is the backbone of the growth of meaningful socio-political discourse by citizen journalists on the Internet just as it is for mainstream media entities. It is these freedoms, enshrined in the First Amendment or Article 10 of the European Convention, that provides the foundation upon which the traditional media discharges its various roles as a public “watchdog”, a conduit between state and citizenry or between citizens, and the publisher of news, information, commentary on matters of public interest.

The legal findings support the proposition that the basis for according traditional mainstream media the importance of this role should be extended to citizen journalists on the Internet who publish information on socio-political issues of public interest who are indeed executing a similar role – a role that is no longer exclusively held by a “small minority”.

In so far as the kind of constitutional protection that can extend to citizen journalists, the legal findings are supported by Barendt’s third perspective is being favourable in protecting citizen journalism on the Internet. The third perspective which only sees fit to extend protection to speech in consideration of the degree in which the said speech promotes the values that are at the core of freedom of expression such as matters of public interest and cloaks socio-political discourse by citizen journalists with a favourable protection.

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Essential in drawing the boundaries of the freedom of speech and expression, is the reliance on the balancing of competing rights or interests. Evident in the findings is that the exercise of these rights may be restricted by other rights or interests such as national security or reputation of individuals or other countervailing rights within the constitutional framework. The approach taken in balancing between the US, UK and Malaysia differs in method.

The balancing exercise is achieved in the US courts through either an “ad hoc” balancing where which interest will prevail is dependent on the facts of individual cases or “definitional” balancing where the type and value of speech as well as category of speaker is identified as protected under the First Amendment. The courts will have to reconsider the inclusion of new players in the class of speakers as a result of the medium of speech which is constantly evolving and included in this class are citizen journalists on the Internet who contribute to socio-political discussion. The adoption of “definitional” balancing to socio-political speech by citizen journalists on the Internet is ideal as the aggregate benefit of such speech is valuable to a society but it does move protection away from the individual and instead to a “class” of speakers.

In the context of UK, much of the balancing takes place between the competing interests between Article 8 and Article 10 of the ECHR and between Article 10(1) and (2) of the ECHR. The freedom of expression in Article 10(1) is limited by the proviso in Article 10(2) where prior to any restriction to this right could be imposed, the approach set out in *Sunday Times* is to be satisfied. The interference with Article 10(1) must be prescribed by law, where the aim or aims must be legitimate under the proviso in Article 10(2) and whether the interference was necessary in a democratic society. In the case of the last requirement, the case of *Handyside* adopts the principle of proportionality whereby the states are left with a margin of appreciation.

The consideration in the Malaysian context would require a detailed consideration of the various legislation that have been enacted by the Federal Parliament that qualify the freedom of speech under Article 10(1) of the Federal Constitution. The proviso in Article 10(2) allows provisions for the restrictions of the exercise of the freedom of speech and expression.

Conclusion

When considering countervailing interests and rights in the balancing exercise, the courts will need to ensure that the publication that is protected is in the public interest. Whilst the exercise of exhaustively defining public interest is a difficult one, the legal findings conclude that the consideration of the underlying values of public interest is more helpful in determining whether the published information is in the public interest. The value is assessed in consideration of two points - firstly, public interest is important in ensuring that the media carry out its function of disseminating information that is essential, informational and cultural; and that secondly, this function is carried out in abiding principles of efficiency, justice, fairness and respect for contemporary social and cultural values. In satisfying the former, citizen journalists on the Internet who are publishing information that is vital in the context of the underlying values will be deemed to be serving the public interest. In satisfying the latter, in order to satisfy the second part of the values to be considered, the application of the 10 indicia test set out by Lord Nicholls in *Reynolds* as a test for responsible journalism will act as a guidance or alternatively, the compliance with a voluntary Code of Practice or editorial gatekeeping.

In the context of Malaysia, there has been recognition of the jurisprudence developed in *Reynolds* and *Jameel* and has seen the application of the standards set out in these landmark cases in defamation cases. The Malaysian decisions in adopting the standards of responsible journalism have adapted the test to include the need to take into consideration the sensitivities of a multiracial and multi religious society.

The publication of information that is in the public interest is vital in determining whether citizen journalists are performing a journalistic function – set out in the following heading.

2.3.2 Citizen journalists as performing a journalistic function

Citizen journalists on the Internet are not professional journalists. But suffice to say that they have the potential to fulfil some of the same functions as the latter and produce information that has journalistic value. Only upon the acceptance and legal recognition of this status will citizen journalists on the Internet be able to surmount the challenge to have such recognition permeate the legislation that accords privileges and protection to journalists such as the open justice principle, protection against prior restraint and confidentiality of sources.

Conclusion

In considering whether citizen journalists are journalists, apart from the considering the value of the information being of journalistic value, particularly in the “public interest” category, there must also be an additional consideration whether the citizen journalist has performed the function of a journalist. One of the essential elements in professional journalism is the need for testing the integrity of the information by utilising the ‘journalistic process’ test. If citizen journalists are to be seen as having the potential of falling within the definition of a journalist, they would have to present themselves as the facilitator of freedom of expression akin to the role played by the media. In order to enjoy the public interest defence, citizen journalists will have to satisfy the ‘responsible journalism’ test and the information relayed must possess an element of ‘public interest’ value.

For this potential to be achieved, citizen journalists must disseminate information to the public which has a public interest value and not merely distribute *any* information. The essential consideration is the value and nature of the speech. The information must demonstrate some hallmarks of editorial oversight in order to satisfy several elements of the indicia test and the test of responsible journalism. Whether citizen journalists intend for the published information to have the abovementioned traits may not be relevant. This is in keeping with the fact that citizen journalists on the Internet may not be *intentionally* using social media platforms to publish in order to inform, debate, comment and share opinions as a journalists but are doing so in the capacity of exercising their right to free speech and expression as citizens. The question whether they are performing a function analogous to that of a journalist is dependent on the circumstances of the rationale for which s/he is claiming to function as a journalist. The rights of journalists which the citizen journalists are invoking are used in the same way a journalist would invoke those rights – in circumstances when the publication is called into question for instance in cases of defamation in raising the defence of qualified privilege or fair comment; or when the exercise of the journalistic function is being curtailed for instance in cases of prior restraint or curtailment of the reporting of court proceedings.

However, if social media citizen journalists can satisfy the test of responsible journalism and public interest as per *Reynolds* and *Jameel*, which the later court has stated can apply to any

Conclusion

medium, this sets out a suitable legal basis which does allow the importance of citizen journalism to become entrenched as a tool of news, discourse and democratic debate and have the rights enjoyed by traditional media extended to them.

2.3.3 Anonymity of Citizen Journalists on the Internet

Disclosure of identity under *John Doe* applications in the US and *Norwich Pharmacal* applications in the UK requires a *prima facie* claim against the user. In achieving the balance between competing interests of the claimant and the user, there is a need for the examination of certain factors before anonymity can be lifted. The first is the appreciation of the value of speech which is being made by the anonymous speaker in that it must be essential to democratic discourse and the silencing of such speech as a result of removal of anonymity will impact of Article 10 right and the corresponding First Amendment provision. Secondly, there is the need to ensure that other means have been utilised such as bringing the claim to the notice of the anonymous speaker in order for the matter to be dealt with in private or removal of the offending entry or post including perhaps an apology. Thirdly, is to ensure that the disclosure of the speaker's identity is necessary in that the claim against the anonymous speaker is meritorious and will achieve the desired aim of the claimant. And finally, whether there is a need to endorse anonymity as it is important to both the speaker and the speech and that this need outweighs the need to lift the cloak of anonymity in order to serve the claimant's action. It is essential to weigh up speech made by speakers who have high autonomous interest such as in political realms against the low risk of harm of such speech in order to take a position of non-disclosure.

In this exploration again, the need for a high degree of credibility and accountability of the citizen journalist is essential. One of the ways in which the place for quality and credible discourse by social media actors can be achieved, and for such activity to prevail and increase in importance as a source of information and news, is in complying and measuring against a standard where a strong degree of accountability resonates bringing our discussion back to the need for editorial quality and revisiting the test for responsible journalism.

Conclusion

2.3.4 Citizen Journalists as the Confidential Source

Building on the discussion above, the anonymity of the citizen journalist who is using social media platforms on the Internet takes on another layer of importance. Another legal conundrum presented by citizen journalists on the Internet is that fact that the citizen journalist could possibly be both the 'source' and the 'journalist'. The confidentiality and non-disclosure of sources is an important element of investigative reporting, the argument is that the same rationale for such protection should be extended to citizen journalists. Disclosure of the identity of the citizen journalist who publishes information as a result of his/her position at the workplace that allows him access to experience, knowledge and insight places the citizen journalist in the position of both the 'source' and the 'journalist'.

3. Recommendations for further research

With every positive utility of Internet-enabled platforms, there is the equally harmful and destructive use of the said platforms and these behavioural trends will continue to fuel legal debate and discussion.

In terms of platforms, one that could serve the public interest and act as the Fifth Estate, not explored in the thesis is *WikiLeaks*. The whistleblower website sees itself as an "international new media non-profit organization" and as "a public service designed to protect whistleblowers, journalists and activists who have sensitive materials to communicate to the public." Its ethos is to make governments more accountable, promote transparency in governance through civil disobedience. As a unique model it promises confidentiality and trust to individuals and anonymity. Several view it as a journalistic tool and a digital media actor whereas others may view it as an irresponsible publisher of sensitive information. One of the points worth exploring is how it could present itself and operate as a credible journalistic tool and further determining whether its activities are journalistic in nature or is the website merely publishing and disseminating information.

In terms of harmful speech on social media platforms and the legal implications flowing from it, not considered in the thesis, is trolling on social media platforms. The challenge is the ability of the courts to draw a line as to what tantamounts to speech that is 'grossly offensive or of an

Conclusion

indecent, obscene or menacing character' under Section 127 of the Communications Act 2003 that would warrant a prosecution. This was highlighted in the recent decision of *Paul Chambers v DPP* [2012] EWHC 2157 in the Divisional Court of the Queen's Bench, High Court.

4. Conclusion

The overall significance of the research is it provides some preliminary answers about the relevant legal and related issues in the recognition of speech by citizen journalists on the Internet. Whilst the first consideration of whether citizen journalists can be considered to be carrying out a journalistic function and therefore may have the right to a public interest defence extending to socio-political discourse was premised on principles that applied to journalists, the second consideration of anonymity and protection as confidential sources was made on the basis of special treatment of the position of socio-political citizen journalists. The latter requires the appreciation of social utility of the speech made anonymously in widening the forum for democratic discourse to individuals.

The legal recognition of citizen journalists on the Internet does not serve to replace the importance of the various roles of the mainstream media but instead complements it in the marketplace of ideas. The degree to which citizen journalism becomes relevant, highly or otherwise, is related to the extent the mainstream media discharges its roles. The role and function of citizen journalism is well worth a reflection in the context of filling the vacuum resulting from the failures and shortcomings of traditional mainstream media to engage with the public.

The legal recognition and development of rights and responsibilities of citizen journalists on the Internet may have contrasting outcomes. On the one hand, journalistic values of objectivity, accountability and increased formality may result in the loss of citizen desired issues, freshness and motives of creating an alternative to institutionalised media and in creating their own professional etiquette. The dangers of the legal complexities may result in citizen journalism on the Internet losing its appeal to both the citizen journalist and the reader. On the other hand, legal recognition will enhance a sense of ownership and authorship in attaining a right or

Conclusion

entitlement under the law to make a contribution in a meaningful way as well as increase the influence and visibility of the citizen journalists in the public gaze.

Highly relevant in the legal landscape in Malaysia is the emergence of a media model that is increasingly decentralised as a result of social media actors on the Internet playing the role of alternative news providers and conduits for democratic discourse. Institutions involved in policy framing and law making need to reengage with the social and political importance of the role discharged by the media both traditionally and on the Internet. The non-recognition of the importance of speech by media outlets is non-progressive to a citizenry that demands increased public speech and engagement. The strengthening of free speech and expression principles through sound development of legal principles and norms is required. A precursor to this is the recognition of the role of the media in a democratic state whereby a liberal and sophisticated media encourages or engages in socio-political dialogue, the exchange of ideas, opinions, recognizing the importance of executing this role for the benefits of the citizenry and the society at large. Upon a strong constitutional foundation, a review should be initiated with consideration of some basic rights that ought to be accorded to the media. Not only will there be the development of the rights of mainstream media, citizen journalists on the Internet can then present a case for such rights to be extrapolated to protect publication of valuable speech in the socio-political context which is in the public interest of the people and act as a catalyst for accountable, responsible and credible citizen journalism on the Internet. The legal recognition is fundamental to both, the individual citizen journalist and the protection of free speech.

GLOSSARY OF TERMS

A

Anonymity	<p>'a situation in which the name of a person who does something such as write a book or give information is not known or is kept secret'</p> <p>Source: Macmillan Dictionary</p> <p><http://www.macmillandictionary.com/dictionary/british/anonymity></p>
Arab Springtime Revolution	<p>'A series of activities ranging from political protests to civil war that happened in a number of Arab Countries, including Egypt, Libya, Tunisia, and Syria, beginning in the early months of 2011'.</p> <p>Source: Macmillan Dictionary</p> <p><http://www.macmillandictionary.com/open-dictionary/entries/Arab-Springs.htm></p>

B

Bebo	<p>A social networking website that encourages 'a new generation to discover, connect and express themselves'.</p> <p>Source: Bebo</p> <p><www.bebo.com></p>
BERSIH	<p>BERSIH started out as a Joint Committee for Electoral Reform in 2005 and it is a social movement in Malaysia. The term is the Malay word for 'clean' which reflects its mission to bring about clean and fair elections.</p> <p>Source: Bersih 2.0</p> <p><www.bersih.org></p>
Blog	<p>The term is short for 'Web log' and functions as an online journal or web journal which allows an individual or groups of individuals to share a running log of events and personal insights.</p>
Blog Swarms	<p>This occurs when 'blogs pick up a theme or begin to pursue a story' and this brews an 'opinion storm' that breaks, impacting the general public's understanding of the subject.</p> <p>Source: Hugh Hewitt, <i>Blog: Understanding the Information Revolution That's Changing Your World</i> (Nelson Book 2005), 1.</p>

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C

Citizen Journalism	This term is used in the context of the aims of this paper to refer to socio-political discourses on the Internet, generated by its users.
Cyberdissidency	This term refers to the act of cyberdissidentship.
Cyberdissidentship	A view of citizen journalism where citizens can magnify their voice to relay an important message, particularly in the socio-political context. However, it is noted that most times, this message is contrary to the State thereby creating an impression of civil disobedience.

D

Deliberative democracy	It refers to the ability of putting the abstract theory where politics is the process by which citizens as subjects attain democracy into practice; and in turn, political theory can facilitate in clarifying the democratic values promoted by public journalists. Source: Albert W Dzur, 'Public Journalism and Deliberative Democracy' (Spring 2002) 34(3) Polity 313,314.
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F

Facebook	It is another social networking website that defines itself as a 'social utility that connects people with friends and others who work, study and live around them'. Source: Facebook < www.facebook.com >
Fifth Estate	A term coined to denote the social journalistic role of the Internet or 'the space for networking individuals created on the Internet by digital technologies'. Source: Open Net Initiative's Fifth Estate project, Oxford Internet Institute, < http://www.oii.ox.ac.uk/research/projects/?id=57 > accessed 21 January 2012.
Flickr	Flickr is a website where users can upload, manage and share their photos. Source: Flickr < www.flickr.com >
Fourth Estate	A term purportedly coined by Thomas Macaulay, and later by Thomas Carlyle in reference to the press, which they believed played an important role in disseminating information to the public – an act which is viewed as crucial in the exercise of democracy. Today, it frequently used to refer to the news media. Source: Thomas Carlyle, <i>On Heroes, Hero Worship and the Heroic in History</i> ([1841] 1993) 141.

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H

"Helicopter Journalism"	The term indicates the distance journalists are from the occurrences and happenings on the ground, suggesting that there is a need for direct contact between the presence journalists at the actual scene of the event and the quality of news. Source: Danny Schechter, 'Helicopter Journalism', (<i>Mediachannel.org</i> , 5 January 2005).
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M

"Marketplace of ideas"	A concept that originated by Mills and has greatly impacted American jurisprudence, where it believed that truth would emerge from 'free trade in ideas' or intellectual competition and that the regulation by government distorts the working of a free market for the exchange of ideas. Source: <i>Abrams v US</i> 250 US 616 (1919) 630-31 (Holmes J).
Mass Media	Refers to 'media that transport information and communication messages over space and/or time'. Source: Rudolf Stöber, 'What Media Evolution Is: A Theoretical Approach to the History of New Media', (2004)19 <i>European Journal of Communication</i> 483, 484.
Media	Refers to the materials used for communication. Source: Harold A Innis, <i>Empire and Communications</i> (OUP 1950).
Media Theory	It is a version of political theory which is a matter of trying to work out how the world works and how it ought to work. Source: <i>Media Theory: An Introduction</i>
Microblogs	It is a blog that is 'smaller than a traditional blog and contains very small or brief entries'. Source: Dictionary.com < http://dictionary.reference.com/browse/Microblogs >
MySpace	A social networking website, similar to Facebook.

N

Netizen	A variant of the term 'citizen', a netizen is someone who is "a user of the internet". Source: Dictionary.com < http://dictionary.reference.com/browse/netizen >
New Media	It consists of various social media platforms and forums found on the Internet and it is commonly referred to as 'social media'.
News	Generally, it is understood as 'information of public interest or concern relating to local, state-wide, national or worldwide issues or events' but recent interpretations extend to include the informal and

Glossary of Terms

	<p>systematic ways in which information of events and issues are disseminated into public discourse.</p> <p>Source: Laurence B. Alexander, 'Looking out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information' (2002) 20 Yale Law & Policy Review 97, 130.</p>
News Media	<p>It is loosely defined as 'media that provide news coverage for the public' to include the variety and specificities of news media such as social media platforms that often employed by citizen journalists.</p> <p>Sources: Collins English Dictionary <http://www.collinsdictionary.com/dictionary/english/news-media></p> <p>News media is not to be confused with 'New Media' and it traditionally comprises of 'newspapers, magazines, television, radio stations, online news service or any other regular publishing news outlet'.</p> <p>Source: Laurence B. Alexander, 'Looking out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information' (2002) 20 Yale Law & Policy Review 97, 130.</p>
Newsbooks	<p>Newsbooks are 16th century precursors to newspapers. The coverage was limited to a single story unlike a newspaper where there is coverage of multiple stories and events. It is different from the pamphlet as newspapers are published serially, periodically, sequentially, predictably and frequently.</p>
NowPublic	<p>A website where 'international news, sports, culture and gossip produced by experts and eyewitnesses offering reliable content'.</p> <p>Source: Now Public <www.nowpublic.com></p>

O

Online Journalism	<p>Generally, the term is explained as journalism practice that uses the Internet as a medium. A conventional example is the online newspaper.</p>
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P

Plurk	<p>Plurk is a social network with game mechanics built-in.</p> <p>Source: Plurk <www.plurk.com></p>
Pamphlets	<p>It is a short, quarto book of 12 sheets when folded once produced 96 pages came to represent an important vehicle of speech. Pamphlets differ from newspapers were published on occasion or when it was needed.</p>

Glossary of Terms

	Source: Joad Raymond, <i>Pamphlets and Pamphleteering in Early Modern Britain</i> (Cambridge University Press 2003) 5, 8.
Participatory Journalism	This phrase is used to explain the phenomenon where there was a surge in activities involving news-gathering, analysis and reportage, which is now extending beyond news to include the dialogues in which readers can learn from each other and engages in the debate arising from the story covered by the news article.
Political Public Sphere	A variant of the 'public sphere', it is a 'sphere which mediates between society and state, in which the public organizes itself as the bearer or public opinion accords with the principle of public sphere – that principle of public information which once had to be fought for against the arcane policies of monarchies and which since those times has made possible the democratic control of state activities'. Source: Jürgen Habermas, Sara Lennox and Frank Lennox, 'The public sphere: an encyclopedia article (1964)', (1974) 3(1) <i>New German Critique</i> 49-55.
Pseudonymity	A variant of the term 'pseudonym', it refers to 'a name that someone uses, that is not their real name'. Source: Macmillan Dictionary < http://www.macmillandictionary.com/dictionary/british/pseudonym >
Public Journalism	This view of journalism promotes the role of the journalist in a democracy as a promoter of reasonable and informed dialogue among citizens.
Public Sphere	A term introduced by Jürgen Habermas and it refers to a theoretical space where 'our social life in which something approaching public opinion can be formed' and 'access is guaranteed to all citizens'. Source: Jürgen Habermas, Sara Lennox and Frank Lennox, 'The public sphere: an encyclopedia article (1964)', (1974) 3(1) <i>New German Critique</i> 49-55.

R

RSS	RSS is short for Rich Site Summary and is a "format for delivering regularly changing web content. Many news-related sites, weblogs and other online publishers syndicate their content as an RSS Feed to whoever wants it." Source: What is RSS? RSS Explained < http://www.whatisrss.com/ >
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Glossary of Terms

S

SLAPP	<p>The term is an acronym for 'Strategic Lawsuits Against Public Participation', where owing to the prima facie case of liability arising from defamatory statements or disclosure of confidential information, the courts issue disclosure subpoenas.</p> <p>Source: Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation</p>
Social Media	<p>A term used to encapsulate 'websites and other online means of communication that are used by large groups of people to share information and to develop social and professional contacts'.</p> <p>Source: Dictionary.com <http://dictionary.reference.com/browse/social+media></p>
Social Networking Sites (SNS)	<p>A "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system". It includes Facebook, Twitter, Plurk, Tumbler, Bebo.</p> <p>Source: Boyd, DM and Ellison, NB (2007), "Social Network Sites: Definition, History, and Scholarship", <i>Journal of Computer-Mediated Communication</i> 13: 210–230.</p>
Socio-political	<p>The term is used to generally describe a combination of social and political factors but its meaning often transcend this to include issues that affect society which it views as essential, both national and internationally, and requiring democratic involvement of citizens in their discussion and determination.</p>

T

Tipping Point	<p>A term that was used by Allan to describe the journalistic phenomenon following the Asian Tsunami crisis of 2004, the moment when citizen journalism came to be known as a significant provider of news.</p> <p>Source: Malcolm Gladwell, <i>The Tipping Point: How Little Things Can Make A Big Difference</i> (Malcolm Gladwell, 2000).</p>
Tor	<p>'Tor, short for The Onion Router is a system intended to enable online anonymity'.</p> <p>Source: Wikipedia <www.torproject.com></p>
Tumblr	<p>A blog that is comprised mainly of photos.</p>
TwitPics	<p>'TwitPic is a website that allows users to easily post pictures to the</p>

Glossary of Terms

	Twitter microblogging and social media service'. Source: Wikipedia < en.wikipedia.org/wiki/Twitpic >
Twitter	'Twitter is an online social networking service and microblogging service that enables its users to send and read text-based messages of up to 140 characters, known as Twits'. Source: Wikipedia < en.wikipedia.org/wiki/Twitter >

U

User-empowered Content (UEC)	User-empowered content is content that is forwarded and shared by users to other users through various share facilities.
User-generated Content (UGC)	It refers to content generated, created, originated or posted by internet users and it ranges from blogs that are personal diaries to blogs that are forums. In the context of this thesis, it denotes a particular area of interests, such as socio-political blogs written and published by political dissidents, opposition leaders or a citizen in conversation with other citizens of matters of national importance affecting the daily life of the citizenry or community.

W

Web 1.0	Generally a term used to refer to the internet before its reinvention as Web 2.0.
Web 2.0	An expression which was used to refer to the second generation of Internet, emphasising its constant development and delivering services tailored to the needs of each user, focusing on the practice of online collaboration and sharing among users.
Wikileaks	'WikiLeaks is an international, online, self-described not-for-profit organisation publishing submissions of secret information, news leaks, and classified media from anonymous news sources.' Sources: Wikipedia < http://en.wikipedia.org/wiki/Wikileaks >
Wordpress	Wordpress is bloghosting site, providing its users with easy tools to publish a blog.

Y

YouTube	It is a video sharing community with enabled personalisation and a following. Source: Youtube < www.youtube.com >
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Europe

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Communications Decency Act 2000 47 USC § 230(c)(1)

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California Code of Civil Procedure section 425.16

New York Civil Practice Law, Rule 3211(g) and Rule 3212(h)

New York Civil Rights Law sections 70-a and 76-a

Nebraska Revised Statute § 20-144

Alabama Code § 12-21-142

Arkansas Code Annotated § 16-85-510

Delaware Code Annotated. Title 10 § 4320.

Washington Revised Code sections 4.24.500

Alaska Statute § 09.25.300

Arizona Revised Statute § 12-2237

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Malaysia

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